IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 49.

MARTIN F. MORRIS AND OTHERS, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA.

Brief on Behalf of the Appellants Martin F. Morris, Edward H. Wilson, Emma McCahill, and Others Claiming under the Kidwell Patent.

I.

STATEMENT OF CASE.

This proceeding, which will be found to be of an extraordinary and exceedingly anomalous character, was commenced by way of a bill in equity filed in the Supreme Court of the District of Columbia on November 26, 1886, in pursuance of an Act of Congress of August 5, 1886 (24 Stat., 335), purporting to be "An Act to provide for protecting the interests of the United States in the Potomac River

Flats, in the District of Columbia." By that Act the Attorney General of the United States was directed to institute suit "against all persons and corporations who may have or pretend to have any right, title, claim, or interest in any part of the land or water in the District of Columbia within the limits of the City of Washington, or exterior to said limits and in front thereof toward the channel of the Potomac River, and composing any part of the land or water affected by the improvements of the Potomac River or its flats in charge of the Secretary of War, for the purpose of establishing and making clear the right of the United States thereto;" and the result is the present unusual and multifarious proceeding, in which 51 different persons, having no common interest whatever with each other, except perhaps that they may be divided into groups in which the persons composing each group have a certain common interest, have been sought to be brought into hotchpot with each other, and have now been kept for upwards of eleven years involved in a grossly and unnecessarily voluminous proceeding in the greater part of which no one person has any special interest.

The Act implies that private persons have or may have private rights in the premises in question; and yet it proposes to make clear the right of the United States thereto. How this apparently inconsistent result is to be accomplished, with due regard to the rights of property guaranteed by the Constitution of the United States, does not appear; nor is the Act in other respects free from grave objection upon constitutional grounds.

The Act, it may be stated, grew out of a previous enactment, a provision contained in the River and Harbor Act of August 2, 1882 (22 Stat., pp. 182, 198), in which authority was given to the Attorney General of the United States to bring suit to vacate any patent which, in his opinion, had been by mistake or illegally or improperly issued for any part of the marshes or flats within the limits of the proposed

improvement of the Potomac River. This provision of law, it may be proper to say, had been solicited from Congress on behalf of those then claiming certain flats in the Potomac River under a patent from the United States known as the Kidwell Patent, which figures quite prominently in the present proceedings, and the validity of which had commenced to be questioned; and the purpose of the claimants was to procure a judicial determination of the question. But whether the Attorney General was satisfied that the Kidwell Patent was valid or for some other reason, he never proceeded to suit under this Act of 1882, although it is understood that he was solicited so to do by the claimants.

Finally the present Act was passed, which made it mandatory upon the Attorney General to institute proceedings of some kind, as other private interests had become involved and were now threatened. But for the extraordinary character of this later Act, for its peculiar language and the drag-net scope of its provisions, the claimants under the Kidwell Patent disclaim all responsibility. The litigation under it has threatened to become well nigh interminable; and it was only after the most strenuous efforts that these claimants were finally successful in bringing the cause to a hearing in the court below. It has been their earnest desire at all times to be advised judicially whether they had or had not any rights in the premises.

As developed by the record of the cause, a Patent from the General Land Office of the United States, in due form of law, was issued, under date of December 6, 1869, to one John L. Kidwell, of the County of Washington, in the District of Columbia, for a tract of vacant land, constituting an island in the Potomac River above the Long Bridge, in front of the City of Washington, containing, according to the recitals of the Patent, forty-seven and seventy-one one-hundredths acres of land, to which the designation was given of Kidwell's Meadows (Rec., vol. I, pp. 15–18, where the Patent is set forth in full, with a plat of the land). It was issued

under a Joint Resolution of Congress passed on February 16, 1839 (5 Stat., 365), which provided for the enforcement of certain statutes, previously incapable of enforcement in consequence of the absence of proper official machinery to carry them into effect respecting the appropriation of vacant public lands by private persons. The Joint Resolution is in the following terms:

"*Resolved, &c.*, That the Acts of the State of Maryland for securing titles to vacant land, which were continued in force by Act of Congress of 27th of February, 1801, in that part of the District of Columbia which was ceded to the United States by that State, and which have heretofore been inoperative for the want of appropriate officers or authority in the said District for their due execution, shall hereafter be executed, as regards lands in the county of Washington and without the limits of the city of Washington, by the Secretary of the Treasury of the United States through the General Land Office, where applications shall be made for warrants, which warrants shall be directed to the surveyor for the county of Washington, who shall make return to the Commissioner of the General Land Office; and payment for said land, according to said laws of Maryland, shall be made to the Treasurer of the United States, whose certificate of such payment shall be presented to the Commissioner of the General Land Office, who shall thereupon issue, in the usual form of patents for lands of the United States, a patent for such land to the person entitled thereto; and the Secretary of the Treasury shall make such regulations as he may deem necessary, and shall designate the officers who shall carry the said Acts into effect: *Provided*, that any land which may have been ceded to or acquired by the United States for public purposes shall not be affected by such Acts."

It is a fact, although it must perhaps be characterized as unwritten history, that the occasion for the enactment of this Joint Resolution was an attempt by some persons, through a rather preposterous application to the land officers of the State of Maryland, a little before the date of the Joint Resolution, to take up, under the Laws of Maryland

declared by the Joint Resolution to be in force in this District, a certain other part of the flats that are included within the limits of the proposed improvements of the Potomac River mentioned in the Act of Congress of August 5, 1886.

The Secretary of the Treasury of the United States, of whose Department the General Land Office then constituted a part, promulgated Regulations under the Joint Resolution for the purpose of carrying into effect the Acts of Maryland therein referred to. These regulations are found in the Record, vol. 1, p. 19. By the Act of Congress of March 3, 1849 (9 Stat., 395), establishing the Department of the Interior and transferring the General Land Office thereto, the Secretary of the Interior was substituted for the Secretary of the Treasury for the execution of the Acts in question and of the Joint Resolution of 1839.

The Acts of Maryland, which were continued in force in the District of Columbia by the Act of Congress of February 27, 1801 (2 Stat., 103), but to which it was necessary to give operative effect and vitality by the Joint Resolution of 1839, were the following three statutes, or parts of statutes:

1. An Act of Assembly of Maryland of January 22, 1782 (Kilty's Laws of Maryland, November Session of 1781, chap. 20), as follows:

* * * * * * *

"SEC. 3. *And be it enacted*, That there shall be a land office for the Western Shore at the City of Annapolis, and for the Eastern Shore at the place for holding the general court on that Shore, under the direction and care of the registers of those offices for the time being; * * * and such registers shall also, on the order or titling of the treasurer of their Shore, issue common or special warrants of vacant cultivation for the surveying any vacant land, cultivated or uncultivated, in any of the counties on their respective Shores; and such warrants shall be directed to, and executed by, the surveyor of the county where the land to be surveyed or escheated shall lie, who shall return his certificate to the register of the Land Office for the Western Shore, to be de-

livered by him to the examiner general, who, * * * if the same shall pass examination, * * * shall deliver it into the land office of the Western Shore; and the register thereof, after payment of the purchase or caution money, if any due, to the treasurer of the Western Shore, shall make out a grant, and present the same to the Chancellor for his approbation, and being attested by him and signed by the Governor for the time being, the seal of the State shall be thereunto annexed.

"SEC. 4. *And be it enacted*, That either of the treasurers may grant orders or titlings to the register of the land office of their respective Shores, for common warrants to take up vacant uncultivated land, or for special warrants to take up cultivated or improved vacant land, on the payment of three shillings and six pence current money per acre; and the person who returns a certificate under such warrant shall also pay to the treasurers respectively, within one year from the time of taking out such warrant, four shillings per acre for every acre of vacancy included in such certificate; so that seven shillings and six pence current money per acre be paid to the State for every acre of vacant land in any manner granted under warrants hereafter to be taken out." * * *

2. An Act of Assembly of Maryland of March, 1786 (Kilty's Laws of Maryland, November Session of 1785, chap. 66), which is as follows:

* * * * * * *

"SEC. 6. That all reserves made of any land in this State for which no patent ever issued, * * * shall be taken off, and any land within the said reserves may be taken up as other vacant land, at the price of seven shillings and six pence current money per acre, or at such other price as such vacant land may hereafter be directed by the legislature to be taken up at."

* * * * * * *

3. An Act of Assembly of Maryland of November Session of 1788, chap. 44 (December 23, 1788), as follows:

* * * * * * *

"SEC. 13. *And be it enacted*, That any of the said lands, and any other lands in this State now vacant, and to affect

which no warrant hath issued, be liable to be taken up in the usual manner by warrant, at the rate of three shillings and nine pence current money per acre, to be paid to the treasurer of the Western Shore in the proportions and within the times required by the Act (of November 1781, Chap. 20) to appropriate certain lands to the use of the officers and soldiers of this State, and for the sale of vacant lands."

It will be noticed that the first of the Acts here recited was passed just about the end of the War of the Revolution, and the other two within a few years thereafter; and this fact will explain the reference in them to vacant *cultivated*, as well as uncultivated lands, the former being mainly, if not exclusively, those lands which had become the property of the State by escheat or confiscation.

In pursuance of these provisions of law and of the Joint Resolution of 1839, John L. Kidwell, in the year 1867, made application to take up the vacant land in the Potomac River, for which in 1869 he received the Patent from the United States, which is attacked in these proceedings. Application was made for the land as for a vacant island in the River; the applicant paid his money to the Treasurer of the United States; and in due time thereafter, after due examination by the proper officers, he received his Patent. He died intestate in 1885 before this suit was begun.

Soon after the Patent was issued to him, Kidwell conveyed a certain undivided interest in the land to John Wilson, who had been his attorney in procuring the Patent, and also an interest to Henry Wells, a surveyor who had rendered services to him. The deeds to these parties were executed in November, 1869. On December 30, 1871, Kidwell, Wilson and Wells, for a valuable consideration, conveyed an undivided interest (one-sixteenth part) to the appellant Martin F. Morris. On March 1, 1872, John Wilson conveyed an undivided interest to his son, the appellant Edward Hartley Wilson. On March 12, 1873, Kidwell conveyed his remaining interest to the appellant Martin F. Morris; but this was

upon a secret trust, the purposes of which have long since ceased. There was no beneficial interest intended to be vested by it in the appellant Morris. (Rec., vol. 2, p. 613.)

John Wilson died on January 10, 1876, having devised his estate to his executors, Samuel V. Niles and Edward Hartley Wilson, for purposes specified in his Will. Samuel V. Niles has since departed this life; and the estate survives in Edward Hartley Wilson.

On February 10, 1882, John L. Kidwell, Henry Wells, and the executors of John Wilson, as also Edward Hartley Wilson in his own right, for a valuable consideration conveyed to the appellant Martin F. Morris one undivided half part of the entire property granted by the Patent (Rec., vol. 5, Appendix, Part I, p. 99). Morris, therefore, claims to be entitled to nine-sixteenths of the property in his own right as a purchaser for a valuable consideration.

Subsequently by various deeds executed in 1886, and which appear in the record, the appellant Morris became invested with the title to all the remaining interests in the property. But these deeds of 1886, as testified by Morris in the record, were executed merely for the purpose of surrendering or transferring the whole title to the United States, so as to remove any possible obstacle that might arise from this source to the proposed improvement, the proposition for the transfer being coupled simply with the reservation of the right to sue for compensation and in such suit to test the question of the validity of the Patent. This proposition, it is understood, was communicated to Congress or to some of its Committees; but, instead of taking any action thereon, it seems to have been deemed best by the Government to proceed in the course indicated in the Act of November 26, 1886, under which these proceedings are presumed to be had. If he has not already reconveyed the interests conveyed to him by these deeds of 1886, he holds those interests in trust for the grantors or their representatives.

Under this condition of the title the present suit was in-

stituted, being apparently a bill in equity to quiet title, or something in the nature of such a bill. The greater part of the bill is devoted to an attack upon the Kidwell Patent, which is sought to be invalidated on eight alleged grounds:

1. That the land covered by the Patent was within the limits of the City of Washington, and was therefore excepted from the operation of the Joint Resolution of 1839.

2. That the land was not in the County of Washington (as distinguished from the City of Washington).

3. That the land was covered by water at the time of the cession of the District of Columbia by the State of Maryland; and was therefore reserved for public use.

4. That at the time of the application for the Patent and at the time of its issue, the land in question was not dry solid land, was unfit for cultivation, and was not therefore subject to be patented.

5. That at the time of application the land in question was subject to tidal overflow, and was not therefore subject to survey by the surveyor.

6. That the land was an accretion to the main land of the City of Washington; and therefore not subject to the Joint Resolution of 1839.

7. That the Patent was obtained by fraud.

8. That the Regulations, heretofore referred to as promulgated by the Secretary of the Treasury to carry the Joint Resolution into effect, were not fully complied with, seven alleged failures being noted, to which reference may be made more fully in the argument.

The defendants answered the bill, denying all the substantial allegations in regard to the invalidity of the Patent; and also the defendants Morris, Wells, Edward Hartley Wilson, and the representatives of John Wilson, pleaded that they were *bona fide* purchasers without notice of any of the alleged irregularities or other defects set forth in the bill of complaint.

After replication filed, there was voluminous testimony taken, most of it of antiquarian record character; and the taking of the testimony extended throughout several years, notwithstanding repeated efforts on the part of the claimants of the Kidwell Patent to bring it to a termination, and to bring the cause to a hearing. For reasons to be stated in the argument, it is believed that the greatest part of this testimony is wholly irrelevant and inadmissible as against the claimants under the Kidwell Patent.

It is not deemed necessary here to state the cases of the other parties to the proceeding. It may possibly be that some of their interests to some extent antagonize those of the claimants under the Kidwell Patent. But so far as this is or may be the case, it is deemed sufficient briefly to notice the matter in the argument.

The case was finally brought to a hearing. So far as the claimants under the Kidwell Patent are concerned, the decision and decree of the court below were against the validity of that Patent, not upon any of the grounds set forth in the bill of complaint or made by the parties, all of which, on the contrary, were held to be entirely untenable, but upon the ground that it was against public policy and not contemplated by Congress that any such Patent should be issued. From this decree the defendants claiming under the Patent have appealed.

II.

ASSIGNMENTS OF ERROR.

Inasmuch as the court below has practically ruled only on one point, and that not made by the parties, and has, either directly or indirectly, decided all other points in favor of these appellants, it is difficult for the appellants to assign more than one or two formal assignments of error; to wit:

1. The court below erred in holding that the Patent of December 6, 1869, issued by the United States to John L. Kidwell, was void as being against public policy, or as not having been the contemplation and purview of the Joint Resolution of 1839.

2. The court below erred in holding that the said Patent was void for any reason.

3. The court below erred in holding that the appellants Morris, Wells, Edward H. Wilson, and the representatives of John Wilson, were not *bona fide* purchasers for a valuable consideration.

4. The court below erred in holding that, as to such purchasers for a valuable consideration, the Patent was void for any reason.

5. The court below erred in not dismissing the bill of complaint.

6. The court below erred in divers other particulars apparent upon the record.

III.

BRIEF OF ARGUMENT.

A.

Reference has been made to the objectionable character of this proceeding on the ground of multifariousness. It may be that only one suit in the premises was contemplated by the Act of Congress; and that, if any injury has been done to the parties by compelling them to come into *hotchpot* in this unconscionable and oppressive manner, it is an injury of which we cannot complain, except to Congress. Apart from the harshness and injustice of the proceeding, these appellants only refer to the matter with the view of respectfully directing the attention of the court to the questionable constitutionality of the Act. What they most desire in any proceeding is to have a final determination in some or any proceeding of their rights in the premises, if any they have. This question, it is believed and respectfully submitted, could have determined in a simple suit filed against them alone, which would not be inconsistent with the scope and purposes of the Act, and would not have involved upwards of eleven years of litigation, and vast and voluminous testimony, unnecessary expense, and unjustifiable annoyance, evidenced by the extraordinary record in the case.

Possibly it may be suggested, in addition to this, that the present proceeding is scarcely the due course of law to which all persons are entitled under the Constitution for the protection of their interests.

It may be noted, also, that the suit is to be instituted against "all persons who may *have* or pretend to have any right, title, claim or interest" in the premises; and yet that the purpose of the suit is to "make clear the right of the United States." How the right of the United States is to be

made clear by assaulting private right, is not made quite apparent: nor is it quite apparent how such assault is consistent with the Constitution.

But this is a branch of the case which we do not care to elaborate. We submit it to such consideration as the court may think proper to give to it. While we do not regard the present proceeding as fair and just, or in accordance with common right, we are willing that the merits of our case, fairly understood, should be adjudicated in any proceeding.

B.

We think that it may be safely stated in the very beginning of our argument, that the whole contention of the complainants in their attack upon the Kidwell Patent has been fully refuted and wholly swept away by repeated decisions of the Supreme Court of the United States; several and probably the most important of them rendered since this suit was instituted. A few citations from these decisions will show this beyond any possible doubt.

In the first place, it has been decided that a patent from the United States is of itself evidence that all preliminaries have been duly complied with by the grantees and all conditions duly performed by them.

> Deseret Salt Co. *vs.* Tarpey, 142 U. S., 251.
> Wisconsin R. R. Co. *vs.* Price County, 133 U. S., 510.
> Langdeau *vs.* Haines, 21 Wall., 529.

In the next place, it has been decided that the action of the Land Department of the Government within the scope of their authority is, in general, conclusive everywhere, except when reconsidered by way of appeal within that Department; and *that as to the facts upon which their decision is based, in the absence of fraud or mistake, that decision is con-*

clusive even in courts of justice, when the title afterwards comes in question.

Maxwell Land Grant Case, 121 U. S., 325, 380.
United States *vs.* Atherton, 102 U. S., 372.
Marquez *vs.* Frisbie, 101 U. S., 473.
Moore *vs.* Robbins, 96 U. S., 530.
Shepley *vs.* Cowan, 91 U. S., 330.
Johnson *vs.* Tounley, 13 Wall., 72.

Then, with reference to proceedings to set aside or vacate a patent from the United States for alleged fraud or mistake, it has been pointedly and explicitly decided that, while "there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that those officers (of the Land Department) have by a mistake of the law given to one man the land which on the undisputed facts belongs to another, to give proper relief," yet "cancelling an executed contract is an exertion of the most extraordinary power of a court of equity; and the power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them."

Maxwell Land Grant Case, 121 U. S., 380.
Atlantic Delaine Co. *vs.* James, 94 U. S., 207.
United States *vs.* Throckmorton, 98 U. S., 61.
United States *vs.* Atherton, 102 U. S., 372.
United States *vs.* Hughes, 11 How., 532.

The decision of the Supreme Court in the case of the Maxwell Land Grant so completely covers the present case that we may be excused for another extract from the opinion in

it delivered for a unanimous court by that eminent jurist, Mr. Justice Miller. Says the Court:—

"We take the general doctrine to be that, when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and that it can not be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the Government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the Government, and as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

Tested by the rule thus emphatically laid down by the Supreme Court of the United States in a suit instituted in the name of the United States to annul a patent, precisely like the present suit, the flimsy allegations of the bill of complaint and the yet more flimsy testimony introduced in support of them, are wholly unworthy of serious consideration. We would deem it a useless waste of time and of the

patience of the court to attempt to analyze that testimony in this brief. Suffice it to say, what even the most casual perusal of the record will bear out, that from the beginning to the end of the record there is not a single scintilla of testimony to show fraud or mistake on the part of the officers of the Land Department or of any of them in regard to the Kidwell Patent, or on the part of the grantee named in that Patent or the persons acting for him. The whole burden of the testimony adduced on behalf of the complainant, so far as it tends at all to show anything relevant to this cause, is to make it appear that the land granted by the Patent was, at the time the Patent was issued, subject to tidal overflow,—as though this, even if conclusively proved to be a fact—and we submit that it has been abundantly proved not to have been a fact—would have been sufficient to prove fraud or mistake on the part of the officers of the Land Department or of the patentee. This fact, if it was essential to the validity of the Patent, was one of the very facts which the officers of the Land Department were required to ascertain, and which they did ascertain, and upon which, in accordance with the decisions of the Supreme Court, their decision was conclusive. How were they mistaken about it? What fraud was there perpetrated upon them to close their eyes? What misrepresentation was made to them to produce a result contrary to the truth? The whole matter was under the very eyes of all of them, in the broad light of day, in front of the National Capital. It would be absurd to talk of mistake or misrepresentation here, and so far as we understand the position of the representative of the United States in this case, he does not do anything of the kind. He seeks simply to have the Patent annulled, because the surveyor or some other officer of the Land Department, who was charged with the inquiry, honestly reported the land as firm land, not subject to tidal overflow, whereas it is now sought to be shown by inference, and only by inference, that in this he was at fault. There is not, as we have intimated, the

slightest scintilla of proof to show that the action of the officers was not honest in every respect. The surveyor who made the survey, who is yet living and who testified in the case, and who is undoubtedly the best witness to testify to the facts, although not over-friendly to the claimants under the Patent, proves conclusively the true character of the land at the time that he made his survey. (See Record, vol. 2, p. 537.)

It is true that, in the bill of complaint, there is an allegation of fraud. This is the seventh specification of the eighth paragraph of the bill; and it consists in the statement that, after Kidwell's application had once been rejected, John Wilson became his attorney to prosecute the application further; that John Wilson was a brother of Joseph S. Wilson, who was at the time Commissioner of the General Land Office; that John Wilson filed affidavits for a rehearing, which contained certain statements alleged to have been untrue; that, as the result of the relationship between John Wilson and Joseph S. Wilson, the latter brought undue pressure to bear upon the examiner of surveys to induce him to change his report in regard to the character of the land and to induce him to report in favor of the application; and that, in consequence of all this, the previous adverse action of the Department was reconsidered and the Patent issued. When this statement was made and the bill of complaint filed, all the persons named and implicated in it were dead; and this attack upon their memory, without the most abundant and conclusive testimony to sustain it, ought to have been regarded by the representative of the United States as too indecent to be made. What testimony is there to sustain it and to relieve it of the imputation of indecency? Only the testimony of one man in the whole record, one John S. Williams, who states that a year or two before the death of Stephen J. Dallas, the examiner of surveys to whom reference has been made, which death occurred in

February, 1883, Dallas, between whom and himself there existed no more than a casual acquaintance, stated to him that he had been compelled to change his report in the matter of the Kidwell application by undue pressure on the part of the Commissioner of the General Land Office; that the original report adverse to the application was true; and that the whole thing was a swindle.

Of the motives that induced this man Williams to testify as he did, it is needless to speak. That his testimony is rank perjury from beginning to end, will be quite evident to any one that reads it. To convict three honored and respected gentlemen, who enjoyed the confidence of the community while they lived, two of them trusted officers of the Government, of the crime of fraud upon the United States, upon such infamous testimony as this, would be an insult to the cause of justice. To make the sacred rights of property dependent upon such testimony, would be a mockery of legal procedure. Assuredly this is not "that class of evi-" dence which commands respect, and the amount of it which " produces conviction," which the Supreme Court required in the Maxwell Land Grant Case already cited.

Reference has been made to certain alleged false statements contained in affidavits submitted by John Wilson on behalf of Kidwell to procure a rehearing. These alleged false statements were to the effect that the affiants Wilson and Wells had no interest whatever in Kidwell's claims; and the proof of the falsehood is supposed to be found in the fact that after the Patent was issued to Kidwell and two months after the affidavits were made both Wilson and Wells received conveyances from Kidwell of undivided interests under the Patent. And this is the whole proof of the alleged falsehood. The falsehood—and a most unjustifiable falsehood it is, since it is absolutely unsupported by proof of any kind—is in the statement of the bill. It would be a strange inference, indeed, that a man's statement of

absence of interest should be discredited by his subsequent acquisition of an interest.

C.

We think we would be fully justified in submitting this case here, inasmuch as the complainants, on whom the burden of proof is, have wholly failed to substantiate their case. But there are several questions raised, which it seems proper to consider—although it would seem that they would all be virtually concluded by the decision in the Maxwell Land Grant Case, already cited.

D.

It is claimed by the bill of complaint that the land in question was within the limits of the City of Washington, and therefore not subject to pre-emption under the Joint Resolution of 1839. This we deny and controvert.

That the Potomac River to low-water mark on the Virginia shore was included in the grant to Lord Baltimore, and belongs to the State of Maryland, is well established (*Binney's Case*, 2 Bland's Chan. Rep., 127). And even if it did not, and the ordinary rule prevailed that each adjacent State owned to the middle of the main channel, the result in the present instance would not be different, inasmuch as the land described in the Kidwell Patent is on the Maryland side of the main channel of the Potomac River. This land is claimed to be an island in the River, and as such it is described in the Patent. If such it was in fact, there can be no question that it was in the County of Washington outside of the limits of the City of Washington.

By the Act of Maryland of 1791, Chap. 45, by which that State ceded the District of Columbia to the United States, it ceded all of the District that was then within its jurisdiction. This, of course, included as much of the bed of the Potomac

River as was within the limits of the District. By the Act of Congress of February 27, 1801, it was provided "that the said District of Columbia shall be formed into two counties; one county shall contain all that part of said District, which lies on the east side of the river Potomac, together with the islands therein, and shall be called the County of Washington; the other county shall contain all that part of said District, which lies on the west side of said River, and shall be called the County of Alexandria; and the said river in its whole course through said District shall be taken and deemed to all intents and purposes to be within both of said counties (2 Stat., 103, 105, Chap. 15, Sec. 2).

The City of Washington is contained within the County of Washington. Its limits were established by President Washington in 1791, and defined by the Act of Maryland of December 19, 1791, Chap. 45, which is the act of Cession of the District already mentioned. The description is as follows: "Beginning on the east side of Rock Creek, at a stone * * * , then east * * * to the Eastern Branch (defining the northern boundary of the City, which is not here important); *then with the waters of the Eastern Branch, Potomac River, and Rock Creek, to the beginning.*" In the deeds of conveyance from the original proprietors of the lands contained within the City of Washington to the trustees designated for the purpose by the President according to law, the description is, "all the lands, lying and being within the following limits, boundaries, and lines, to wit: Beginning on the east side of Rock Creek, at a stone * * * to the Eastern Branch; *thence by and with the waters of the Eastern Branch, Potomac River and Rock Creek* to the beginning." But the expressions "with the waters" and "by and with the waters" are, of course, legally and substantially the same.

The City of Washington was incorporated by Act of Congress of May 3, 1802 (2 Stat., 195). But this act was repealed, and the city of Washington was reincorporated by

Act of Congress of May 15, 1820 (3 Stat., 583); and this last Act was in force when the Joint Resolution of 1839 was passed, and remained in force until after the Kidwell Patent was issued. None of these acts, however, undertake in express terms to define the corporate limits of the City of Washington; they merely recognize the city as already existing within the limits established by President Washington and the Maryland Act of Cession. The expression used in the Act of 1802 is "that the inhabitants of the City of Washington be constituted a body politic and corporate"; and in the act of 1820 it is "that the inhabitants of the City of Washington shall continue to be a body politic and corporate." When, therefore, the Joint Resolution of February 16, 1839, provided for the pre-emption by private persons under the laws of Maryland of "lands in the County of Washington and without the limits of the City of Washington," it is beyond question that it means the limits of the city as established by President Washington in 1791; and equally beyond question is it that those limits on the southwestern side, with which we are now dealing, were the waters of the Potomac River.

Now, it is well-settled law that the limit of private ownership on waters where the tide ebbs and flows is high-water mark on the shore.

3 Kent's Commentaries, 427.
United States *vs.* Pacheco, 2 Wallace, 587.
Smith *vs.* Maryland, 18 Howard, 71.
Ex parte Jennings, 6 Cowen, 518.

And the rule in regard to municipal corporations is precisely the same, unless otherwise specifically provided by statute.

Dillon on Municipal Corporations, sec. 182 and notes.
Jones *vs.* Soulard, 24 How., 41.
State *vs.* Jersey City, 1 Dutch (N. J.), 525.
Douglas *vs.* Placerville, 18 Cal., 643.

If, therefore, there was a channel of the River Potomac between the shore on which the City of Washington is situated and the land designated as Kidwell's Meadows, it is undoubted that this land, when granted by the Patent, was outside of the limits of the City of Washington. Now that there was such a channel, commonly known as the Swash Channel, is abundantly proved by the testimony, and is a simple historical fact well known to every old resident of Washington. And it is a fact, too, which entered into the cognizance of the officers of the Land Department in the determination of the question whether the Patent should be issued; and, under the ruling of the Supreme Court in the *Maxwell Land Grant Case*, it should be considered as closed and settled.

This consideration, of course, would not only dispose of the claim that the land in question was included within the limits of the city of Washington, but also of all adverse claims of adjoining riparian owners, who would unquestionably be restricted to high-water mark on the shore.

We believe that we have said sufficient to show that seven of the eight reasons assigned in the eighth paragraph of the bill of complaint for the alleged invalidity of the Kidwell Patent, are wholly untenable. The eighth and last reason assigned by the bill of complaint for such invalidity is the alleged failure of conformity with the regulations issued by the Treasury Department in 1839 to carry into effect the Joint Resolution of February 16, 1839, already cited; and there are seven of such alleged failures.

It might be a sufficient answer to all this, to say, in accordance with repeated adjudications, that if the statements of the bill in this regard were entirely true, the failures in question would be no more than mere irregularities that would not vitiate the patent.

Maxwell Land Grant Case, 121 U. S., 380.
Minter *vs.* Crommelin, 18 How., 87.
Hussey *vs.* Smith, 99 U. S., 20.
U. S. *vs.* Arredondo, 6 Pet., 691.

It is objected, for instance, that a chain-carrier, who is alleged—and so far as we can infer from the testimony, falsely alleged—to have been engaged in making the survey of the land described in the Patent, had not taken the oath prescribed by the laws and regulations. Has it come to this, that the Patents issued by the Government of the United States, most solemn instruments of writing that constitute our muniments of title, must be overthrown because some petty employé like a chain-carrier, did not take an oath? What control has a patentee over such matters? Assuredly the draftsman of this bill of complaint must have been sorely pressed for grounds of attack upon this Patent, when he was compelled to have recourse to frivolous puerilities of this character. But they are in keeping with the unjustifiable assault by him upon the memory of three deceased gentlemen, who held honorable positions and enjoyed an unblemished reputation in their own day.

But another, and perhaps more satisfactory, answer to these objections, is that most, if not all of them are simply untrue: and the draftsman of the bill should have known that they were untrue when he made them. For instance, one of these objections is that John L. Kidwell did not file with the Treasurer of the United States an affidavit such as was required by the ninth of the Regulations to which reference has been made (Rec., vol. 1, p. 10, 20). And yet annexed to the bill as an exhibit (Rec., vol. 1, p. 26) is a duly certified copy from the General Land Office of the required affidavit, which, with the other papers, was transferred to that office by the Treasurer. Assuredly misrepresentation is greatly out of place in any attempt to enforce the rights of the United States.

Perhaps, it may be proper to notice another of these objections specifically, although it is scarcely less frivolous than the others. This is the sixth, which is to the effect that the Kidwell Patent or rather a draft of the grant prior to the issue of the patent, should have been submitted to

the Equity Branch of the Supreme Court of the District of Columbia, or to the judge holding that equity court, as the successor of the Maryland chancellor, for his approval. It is not true, as stated in the bill, that the Act of Congress or the Treasury Regulations required any such submission. On the contrary, such submission was distinctly dispensed with by the Regulations, and the Solicitor of the General Land Office was by them constituted a judge to hear and pass upon any caveat that might be filed to the issue of the Patent. In the absence of caveat, it was provided by the Regulations that a Patent should issue upon the report by the examiner general of the correctness of the surveyor's return.

E.

We have stated that the owners of the Kidwell Patent have no controversy with any of the parties to this cause other than the complainants. If their contention is correct that the land covered by that Patent was, at the time of the grant, an island in the Potomac River, there could have been no antagonistic rights of any riparian owners within the City of Washington: for the legitimate claims of such owners could not have extended beyond high-water mark on the shore of the River.

But there is one class of claimants, designated as the Marshall heirs, whose claims seem to conflict with those of the owners of the Kidwell Patents. We are not advised that this is a proper cause in which to litigate such conflicting claims, in the absence of a distinct and definite condemnation of the land in question by the United States for public uses. Yet a brief consideration of the matter may not be entirely improper here.

The Marshall heirs claim the bed of the Potomac River under the grant of what is known as the Northern Neck of Virginia to Lords Culpeper and Fairfax. In view of the

grant to Lord Baltimore and the repeated adjudications of the Courts to the effect that the whole bed of the Potomac River passed to the State of Maryland under that grant, it would seem to be a useless waste of time to attempt to show that the claim of the Marshall heirs, so far as it is antagonistic to the Kidwell patent, is wholly unfounded. It is no better than would be the claim of a descendant of Powhatan, or some other aboriginal occupant.

But the claim of the Marshall heirs has been reinforced by the conveyance to them of the title of the heirs and representatives of Lord Baltimore, or of persons claiming to be such heirs and representatives. So far as we are concerned, we deny that there is any sufficient proof in the record that the persons so purporting to convey the title that is assumed to have been in Lord Baltimore, are in fact his heirs and representatives. And we deny that, if they were, they had any right, title, or interest in the premises which they could convey to any one.

All the proprietary rights of the Lord Proprietary of Maryland, with all other property of alien enemies, was confiscated to the use of the State of Maryland by the Act of Assembly of that State of October, 1780, Chap. 45, Sec. 2; and they were never restored. We understand the claim of the Marshall heirs to be that, because by the Treaty of Peace of September 3, 1783, between the United States and Great Britain, it was provided that Congress would recommend to the several States to restore confiscated estates, therefore the heirs and representatives of Lord Baltimore must be presumed to have been restored to the proprietary rights of the last Lord Proprietary. But it does not follow that, because Congress agreed to make that recommendation, the States would agree to concur in it. As a matter of fact, Maryland did not concur in it; and so far as the rights of the Lord Proprietary were concerned, it manifestly could not have concurred in it with any propriety. It could not have acquiesced in the restoration of rights that were little less

than governmental. It might have done, as we understand that Pennsylvania afterwards did with reference to the somewhat similar claims of the heirs of William Penn,—that is, extinguish them by purchase. But it did not do so; and there can be no such restoration now, either by legislative action or judicial decision, so far as to affect any adverse rights that have been acquired by private individuals. This is all that we deem it necessary to say in this regard at this time.

F.

There is one further consideration which we deem it proper to submit. So far as the claimants under the Kidwell Patent are concerned, this is no more than a proceeding to vacate their patent for alleged invalidity in its issue. We submit that it is not competent to maintain a bill in equity for any such purpose without repayment of the purchase-money paid by the grantee in the payment, or a tender to repay the same. To procure the rescission or cancellation of a contract, it is elementary law that the party seeking to rescind must offer to return the consideration or property received; and we are not aware that the United States, when they become litigants in respect of any property granted by them, stand any differently from private individuals, or that they may, differently from private individuals, recover the property and retain the money too. The money must be tendered before suit is instituted.

IV.

The Supreme Court of the District of Columbia, in deciding this case, so far as these appellants are concerned, have found all the substantial issues, both of fact and of law, except perhaps one, in favor of the appellants. It has found that the land in question was patentable under the laws of the United States. It has found, as we understand it,

that there was no fraud or substantial irregularity in the proceedings upon which the patent was based. It is true that it is difficult to tell what conclusion it reaches upon some points; and we certainly do not propose to follow or examine its peculiar reasoning in regard to the preliminary proceedings had in the Land Office. We submit that consideration of those proceedings, in the absence of proof of fraud, is foreclosed by the repeated decisions of this court to which reference has already been made. The ground upon which the court bases the conclusion reached seems to be that it was against some kind of public policy for the United States to grant the land covered by this patent.

We confess our utter inability to understand the application here of any such doctrine. Here was an island that had been formed in the Potomac River in front of the City of Washington; not the bed of the river, as is unjustifiably assumed in the opinion, but an island, solid and firm land, possibly in part subject to occasional tidal overflow, as we have known Pennsylvania Avenue, in the City of Washington, to have been at times; an island such as is not unusual in our great inland waters, formed by gradual deposit brought down by the stream, and from which navigation and fishing and all the other public easements incidental to navigable waters are excluded as effectively as they are from the hill on which this Capitol stands. And the argument seems to be that such land as this was not intended to be granted under the Resolution of Congress of 1839. And why not? As a matter of fact, as already intimated, it was the desire to take up these flats in the Potomac River that led to the passage of that Resolution. And now we are told in substance that Congress did not know what it was doing. That is an argument which we find it impossible to answer.

Application was made by Kidwell, not for the bed of the River, but for an island in the River, firm and solid land above the water, which, if it was such, beyond all doubt and

all question, was subject to the operation of the Resolution of 1839. The officers of the Land Office, within whose jurisdiction the subject-matter was, found that the land was an island, above the water, not subject even to general tidal overflow; and thereupon the patent was issued. It is not a case of procuring a grant for the bed of the river, or of seeking in any manner to interfere with public rights in navigable waters. If solemn muniments of title like a patent of lands from the Government of the United States, if vested rights acquired in good faith thereunder, the rights of purchasers for a valuable consideration without notice of any irregularity, are to be ruthlessly overthrown upon considerations such as are set forth as the basis of the conclusion reached by the court below, there is no longer security for private right of any kind. If this patent is to be overthrown and all rights acquired under it disregarded, it is to be hoped that some better and more worthy reason will be found for the act than is disclosed in the opinion rendered in this case by the Supreme Court of the District of Columbia.

It is respectfully submitted that the decree of the Court below, as far as it relates to the right, title and interest of the parties to this cause, claiming under the Kidwell Patent, should be reversed.

GEORGE E. HAMILTON,
NATHANIEL WILSON,
Counsel for Martin F. Morris and Others Claiming under the Kidwell Patent.

No. 49.

Brf. of Webb & Webb for Appts

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In the Supreme Court of the United States.

OCTOBER TERM 1898.

No. 49.

MARTIN F. MORRIS ET AL.

vs.

THE UNITED STATES.

Brief of the Appellants, Rose L. Easby and Fanny B. Easby, Trustees of the Estate of William Easby.

HENRY RANDALL WEBB,
JOHN SIDNEY WEBB,
Counsel for Appellants.

LAW REPORTER PRINT.

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THE UNITED STATES.

Brief of the Appellants, Rose L. Easby and Fanny B. Easby, Trustees of the Estate of William Easby.

ARGUMENT.

Rose L. Easby and Fannie B. Easby prosecute this appeal, having been made parties hereto by agreement on April 15, 1895, as the heirs of John W. Easby, surviving executor of the will of William Easby, deceased (7 Vol. 2,397), and as such heirs the representatives and trustees of the estate of said William Easby, under and by the terms of his last will and testament. 3 Vol. 759.

Appellants, as trustees under said will, are owners of certain lots affected by this suit, and claim that the said lots front upon the Potomac River; that all accretions formed in front of the said lots by the action of the river or other-

wise belong to the said lots, and that they extend to the water of the said river and have riparian rights.

The lots belonging to the estate of William Easby:

Lots 2, 3, 4, 5, 6, 7, 8 and 9, Square 63.
Lots 3, 4, 5, 6 and 7, Square 89.
Lot 1, Square 129.

When the city of Washington was founded, the squares, in which these lots are situated, were laid out immediately upon the Potomac River and had said river described as their southern boundary.

I.

It is therefore maintained that it was originally intended that these lots should have water privileges and that they were dedicated and laid out for that purpose.

The land which has been added and which has appeared on the south of these lots, since the founding of the city of Washington, has come from alluvial deposits and from accretions, gradually and by imperceptible degrees; as the testimony overwhelmingly demonstrates.

The land, which is referred to and often called "The Kidwell Meadows," was not an island, but an accretion to to the main land, as the evidence shows.

As such accretion and alluvial, it belongs to the property bordering on the river:

> "It is well settled law, that, when grants of land border on running water, and the banks are changed by that gradual process known as accretion, the riparian owner's boundary line still remains the stream, although during the years, by this accretion, the actual area of his possession may vary."
>
> New Orleans *vs.* United States, 10 Pet. 662, 717.
> Nebraska *vs.* Iowa, 143 U. S., 357.

> "Alluvion is an addition to riparian land, gradually and imperceptibly made by the water to which

the land is contiguous. The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on.

"The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property."

St. Clair Co. *vs.* Lovingston, 23 Wall. 68.
Jones *vs.* Johnston, 18 How. 150.
Jones *vs.* Soulard, 24 How. 65.
Schools *vs.* Risley, 10 Wall. 110.
New Orleans *vs.* United States, 10 Pet. 662.
Jeffries *vs.* Omaha Land Co., 134 U. S. 193.

"Among the rights of riparian owners are access to the navigable part of the river from the front of his land; and the right to make a landing wharf or pier for his own use or the useof the public."

Dutton *vs.* Strong, 1 Black. 23.
Railroad Co. *vs.* Schurmeir, 7 Wall. 272.
Yates *vs.* Milwaukee, 10 Wall. 497, 504.
St. Louis *vs.* Rutz, 138 U. S. 246.
Water Power Co. *vs.* Commissioners, 168 U. S. 368.

"When a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary; and a deed describing the lot by its number conveys the land up to such shifting water, so that in the view of accretion, the water, if named as boundary, continues to be the boundary, and a deed of the lot carries all the land up to the water line."

Jeffries *vs.* East Omaha Land Co., 134 U. S. 179.

"When premises above tide-water are described as bounded by a monument standing on the bank of a river, and a course is given as running from it down

the river as it winds and turns to another monument, the grantee takes *usque filum aquæ*, unless the river be expressly excluded from the grant by the terms of the deed."

Luce *vs.* Carley, 24 Wendall, 451.
County of St. Clair *vs.* Lovingston, 23 Wall. 64.
Railroad Co. *vs.* Schurmeir, 7 Wall. 272.
Jones *vs.* Soulard, 24 How. 41.

Justice Miller says:

"This riparian right is property, and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it can not be arbitrarily or capriciously destroyed or impaired.

"It is a right of which, when once vested, the owner can only be deprived in accordance with established law; and, if necessary that it be taken for the public good, upon due compensation."

Yates *vs.* Milwaukee, 10 Wall. 504.
Weber *vs.* Harbor Commissioners, 18 Wall. 65.
Shively *vs.* Bowlby, 152 U. S. 14.

The opinion of the court below maintained that the decision in the Steamboat Company Case, 109 U. S. 672, controls this case. It does, but not as applied by the court below. The controversy in the Steamboat Case was in regard to Squares 472 and 504, and the situation was entirely different from that of Squares 63, 89 and 129.

The court below in its opinion said:

"Without exception all the lots between 17th street and 27th street, with respect to which riparian rights are claimed, lie to the north of Water street, which intervenes between them and any channel of the river. It results that, according to the decision of 109 U. S. whatever riparian rights ever appertained to those lots must now belong to the United States to the exclusion of the claimants."

This positive statement in regard to Water street can not be justified by the evidence of the different maps of the city or by the other evidence in the record.

On the Ellicott map (1 Vol. 324; 5 Vol. 120) Squares 63 and 89 lie north of A street.

On the Dermot map (5 Vol. 118), where the shape of these squares is different from that of the Ellicott map, they have for their northern and southern boundaries two unnamed streets.

These streets are shown on the King map and are named separately "Water Street" and "Lower Water Street." 6 Vol. 128. 7 Vol. 2494.

Water street does not constitute one of the boundaries of Square 129. On the Ellicott and King maps this square lies north of A street, while on the Dermot map it borders directly on the Potomac river.

On the Register of Squares, the only record in which the boundaries of the different squares in the city are set forth at length, Squares 63 and 89 are bounded on the north by Water street and on the south by the Potomac river, (3 Vol. 793, 700), and Square 129 is bounded on the north by B street and the south by the Potomac river. 3 Vol. 787.

The statement that these squares "lie to the north of Water street" is thus shown to be wrong and misleading.

In the record "Water street" is frequently mentioned and referred to as intervening between certain lots and squares and the Potomac river, but no mention is made of A street or of "Lower Water street."

These streets are not the same as Water street and should not be confused with it or mistaken for it.

In the Steamboat Case there never was any doubt in regard to the existence of Water street and of its being one of the boundaries of Squares 472 and 504; but the question was whether Water street, as laid down on the map, would deprive these squares of water privileges.

An examination of the records in regard to square 472 discloses the fact that this square was first returned with its southwest boundary, The Potomac River, on June 15, 1793. 7 Vol. 2138. This boundary was subsequently, on December 24, 1793, changed to Water street, and it was assigned to Notley Young with this boundary with his knowledge and consent. 7 Vol. 2147.

In referring to this act, Matthews, J., says:

> "The commissioners recorded in their book, which by law they were authorized to keep for that purpose, their certificate that they and Young had agreed that the whole of the same square shall remain to the said Notley Young, agreeably to the deed of trust concerning lands in the said city, and attached thereto a plat of the square, with boundaries, as follows: 'Bounded on the north by L street, four hundred and seventy-nine feet, four inches; the south by M street, south, three hundred and fifty-seven feet, three inches; the east by 6th street, west, two hundred and eighty-nine feet, ten inches; the southwest by Water street, three hundred and fourteen feet, three inches,' as per return dated December 24th, 1793."

The book which the commissioners were authorized by law to keep and in which they recorded the agreement between themselves, as the representatives of the United States, and an original proprietor in regard to the subdivision and boundaries of this square, together with a plat and description of the square itself was "The Register of Squares."

This reference shows that Supreme Court of the United States considered "The Register of Squares" as an official record.

The character and importance of this record is further shown by Justice Matthews when he says in the same opinion (109 U. S. 680):

> "The transaction between Notley Young and the

> public authorities, as evidenced by the documents and circumstances thus set forth, was equivalent in its result to a conveyance by him to the United States in fee simple of all his land described, with its appurtenances, and a conveyance back by the United States to him of square No. 472, bounded and described as above set forth."

And when we consider the additional fact, that the Register of Squares is the only record, in which the boundaries of the squares in the city of Washington are set forth and described at length, it becomes evident that it is not only an official record but a very important one.

It may, therefore, be taken as an established fact that "The Register of Squares" is the official record, which contains the agreements, made between the original proprietors of the land, upon which the city of Washington was laid out, and the commissioners representing the United States; and the subdivisions and boundaries of the squares comprising the said city.

The decision in regard to the riparian rights of Square 472, in 109 U. S. 472, was evidently based upon the Register of Squares and in determining the question of riparian rights of Squares 63, 89, and 129, the entries in this record relating to said squares are of the utmost importance.

Much stress is laid in the opinion of the court below upon the testimony of Stewart, the custodian of the records, to the effect that the Register of Squares is of no more value as a record than Division book No. 1. 4 Vol. 1502. From this the conclusion is drawn that the Register of Squares should be rejected, because the Supreme Court of the United States rejected Division book No 1. 109 U. S. 681.

But there is no proper foundation for this conclusion and it is based upon a wrong statement of fact. The statement of Stewart, relied upon by the court below, is merely a con-

clusion of his own, and should be given no more weight than an opinion of any other employé in charge of public records. But this conclusion of Stewart's is absolutely wrong and amounts to nothing as far as it undertakes to show that "the Register of Squares" is not an official record.

First. Because an examination of the evidence will show that Division book No. 1 is a record of much less importance than the Register of Squares. 4 Vol. 1537–40, 1613–16, 1674–5.

Second. Because it is flatly contradicted by Stewart's own testimony to the effect, that the Register of Squares had always been accepted as valid and authentic books and records of the city. 2 Vol. 667–8.

As we have shown, the Register of Squares is the only record in which the boundaries of the different squares are set forth at large and described in words and not figures only; it contains the agreements between the commissioners representing the United States and the original proprietors in regard to the divisions, subdivisions and boundaries of the different squares. It is referred to and expressly recognized as an official record by the Supreme Court of the United States when it based its decision upon it and held that—

> "the Commissioners recorded in their book, which *by law they were authorized to keep for that purpose, their certificate that they and Young had agreed, &c.*"
>
> 109 U. S. 677, 678.

The following entry is made in "The Register of Squares" in regard to Squares 63 and 89. 3 Vol. 792, 700.

> "At the request of the Commissioners appointed under the act of Congress for establishing the temporary and permanent seat of the Government of the United States the following square in the city of Washington was recorded the 3rd day of January, 1800:"

Square 63.

Plat 3, Vol. 793.

"Bounded on The north by Water street two hundred and eighty-two feet eight inches.
The east by 22nd street west.
The west by 23rd street west.
The south by *Potomac River.*
As per return dated June 17th, 1793.
August 22nd, 1795.
JAMES R. DERMOTT.

"Thomas Johnson, David Stewart and Daniel Carroll commissioners assigned the lots in this square as compensation for the claims of the original proprietors and owners of the said lots formerly set out in Hamburgh.

"Dated the 26th day of June, 1794.

"Aug. 20, 1799.

"R. KING, *Surveyor.*"

Square 89.

Plat 3, Vol. 700.

"Bounded on The northeast by Water street 544 feet.
The east by 21st street west.
The west by 22nd street west.
The south by *Potomac River.*
As per return dated June 17th, 1793.
Aug. 9th, 1799.
R. KING.

"Thomas Johnson, David Stewart and Daniel Carroll, commissioners, set out and assigned the lots in this square (3 Vol. 701), as compensation for the claims of the original proprietors and the owners of said lots formerly in Hamburg.

"August the 28th, 1799.

"R. KING, *Surveyor.*"

The Southern boundary of Squares 63 and 89 was fixed as the Potomac River, and was so determined upon in January, 1800, after seven years' consideration; prior returns of the said squares having been made in June, 1793; of Square 63, in August, 1796, and of Square 89 in August, 1799.

Similar to the transaction in regard to Square 472, this settlement of the boundaries of Squares 63 and 89 was agreed upon between the commissioners and the original proprietors of the land; and was recorded in the Register of Squares; that book, which the commissioners were authorized by law to keep for that purpose.

If such an agreement was binding, when made in regard to Square 472, we are at loss to see why it should not be binding when made in regard to Squares 63 and 89.

The peculiar situation of these squares accounts for the way in which they were subdivided. They are situated where a small town formerly known as Hamburgh stood. In the division between the original proprietors and the Government, the lots in these squares were given to certain lot holders in Hamburgh in exchange for their lots and as *compensation* for the claims of the original proprietors and *owners* of the said lots formerly set out in Hamburgh.

The lots in Hamburgh, which were exchanged for lots in Squares 63 and 89, were, with few exceptions, situated on the Potomac River and possessed riparian rights. This constitutes a strong argument in favor of like privileges having been given to the lots in Squares 63 and 89, because the water privileges at that time constituted their only value; the lots would have been of no value without these privileges; and it is not to be presuumed that the lot holders would have surrendered water privileges, which might in time become very valuable, without a like return.

The letter written by Deakins and Stoddert (7 Vol. 2162), in December, 1790, to President Washington, and referred to in the opinion of the court below (7 Vol. 2538), has no bearing upon this question and throws no light upon it.

Because it is no proof of the assertion contained, and also because the value of the lots at that time is no criterion of their present or their value in August, 1886.

Again, the effect of the letter of Deakins and Stoddert is very much diminished by that of Ellicott of September, 1791, in which he advises a sale of lots in Funkstown (Hamburgh), "Where a town and navigable waters presented great inducements to purchasers." 6 Vol. 301.

The following entry is made in "The Register of Squares" in regard to Square 129. 3 Vol. 787.

> "At the request of the Commissioners, appointed under the Act of Congress for establishing the temporary and permanent seat of the Government of the United States, the following square in the city of Washington was recorded the 13th day of April, 1797.
>
> Square 129.
>
> Plat 3, Vol. 787.
>
> "Bounded on The north by B street north, three hundred and eleven feet eight inches.
> The east by 19th street west.
> The west by 20th street west.
> The south by the *Potomack River.*
>
> "The Commissioners and David Burnes, original proprietor of this Square 129, in the city of Washington, have agreed that lot one shall remain to the said David Burnes, and lot two is subject to be sold agreeably to the deeds of Trust concerning lands in the said city.
>
> "Witness our hands this 26 day of December, 1796.
>
> "GUST'S SCOTT,
> "WILLIAM THORNTON,
> *Commissioners.*
>
> "D'D BURNES.
>
> "Witnesses:
> "JNO. NICHOLSON,
> "T. MUNROE."

This transaction is similar in every material particular to that had between Notley Young and the Commissioners, which, as was held in 109 U. S. 678, determined the boundaries of Square 472, and, by the interposition of Water street between it and the Potomac river, deprived that square of riparian rights.

If, by the interposition of Water street as a boundary to this square, Notley Young and his assigns were deprived of riparian rights; it certainly seems reasonable to assume that David Burnes and his assigns were given riparian rights when the Potomac river was made the southern boundary of Square 129.

There can be no doubt that when a division of Squares 63, 89, 129 and 148, was being made, it was understood and agreed by the original proprietors of the land comprising these Squares and commissioners representing the United States, that said Squares should enjoy water privileges and have riprarian rights. They were put on a footing entirely different from the other Squares fronting on the Potomac river, which are involved in this suit.

The Register of Square shows that these were the only Squares from Easby's Point to Greenleaf's Point, which are described as having the Potomac river for one of their boundaries, and which boundary was not subsequently changed to Water street, as was done with other Squares; to wit:

Square 472 (7 Vol. 2138, 2147).
Square 473 (7 Vol. 2138, 2148).
Square 505 (7 Vol. 2138, 2151).
Square 506 (7 Vol. 2139, 2152).
Square S 506 (7 Vol. 2139, 2153).

This is of itself very significant, and becomes more so when we look for a reason for this distinction. Where these Squares were laid out, there existed at that time a small town, known as Hamburgh. Some of the lots in this town

were situated on the river front and possessed raparian rights. The only other part of the city, in which squares are shown bounded by the river, is where another small town was situated known as Carrollsburgh.

It is evident, therefore, that when the city of Washington was laid out, the lots fronting on the river, situated in these two small towns, were placed on a different footing from those in other parts of the city and it was manifestly not intended to deprive them of raparian rights. 7 Vol. 2294.

Mr. Ellicott in fact, in September, 1791, advised a sale of lots in Funkstown (Hamburgh). "Where a town and navigable water presented great inducements to purchasers." 6 Vol. 301.

As we have seen, Squares Nos. 472, 473, 505, 506 and S. of 506, which were returned June 15, 1793, by Andrew Ellicott, and by said return each given a boundary on the Potomac river, were altered by a subsequent return, made on December 24, 1793, and the boundary of the Potomac river was changed to that of Water street.

This later return was adopted and acted upon on June 22, 1794 (4 Vol. 1595), by the following order:

> "The Commissioners direct that the survey and returns made of the part of the city on Mr. Young's land adjoining Potomak, leaving Water street according to design of the plan of the city, be acted on instead of the returns made by Major Ellicott, in some instances bounded with and in others near the water."

In obedience to this order, the return of these squares giving Water street as their boundary instead of the Potomac river, was accepted and these squares divided according thereto under an agreement between Notley Young, the original proprietor and the commissioners, Messrs. Scott, Thornton and White, on January 12, 1796, March 24, 1797, and October 28, 1800.

This transaction of recording the boundaries in the Reg-

ister of Squares was held to be binding upon the original proprietor of Square 472, and to have settled the question of riparian rights for that square.

109 U. S. 678, 680.

No alterations appear to have been made in the boundaries of Squares 63, 89 and 129, and they were all recorded with their boundaries as given in the first return. This was not done hurriedly or without due consideration, and can not be considered as an empty formality and merely experimental, and in no way binding upon the United States Government.

Squares 63 and 89 were first returned in 1793, with the Potomac river for their southern boundary; they finally were recorded in the Register of Squares with this boundary in 1800. Square 129 was subdivided and its boundaries agreed upon in December, 1796, and recorded in the Register of Squares in April, 1797. Ample time was given in all these transactions for alterations and changes, had such been contemplated.

The fact that the commissioners, after due consideration, failed to make any changes in this set of squares (63, 89, 129, 148), and recorded them with a boundary on the Potomac river, while they changed that boundary in another set of squares (472, 473, 505, 506, S. of 506) is most significant and goes far to show that this was done advisedly, and that the first set of squares was intended to enjoy riparian rights and water privileges.

> "A party is not permitted to deny a state of things which by his own conduct he has led another to suppose existed and who has acted accordingly upon that belief."
>
> Morgan *vs.* RR. Co., 96 U. S. 720.
> Merchants' Bank *vs.* State Bank, 10 Wall. 604.

"Whatever was given or offered by the indications of a map, was intended to operate, and doubtless did operate as the inducement to the purchase of lots and as an enhancement of their price."

Rowan's Executor *vs.* Portland, 8 B. Monroe, 246.

Where a survey and patent show a river to be one of the boundaries of the tract, it is a legal deduction that there is no vacant land left for appropriation between the river and river boundary of such tract.

Churchill *vs.* Grundy, 5 Dana, 100.

County of St. Clair *vs.* Lovingston, 23 Wall., 63.

"The right acquired by a purchaser of a lot in an established town is not confined to the mere use of the ground purchased but extends to the use of all the streets, alleys, public grounds and other public rights in the town according to their appropriate purposes."

Rowan's Executor *vs.* Portland, 8 B. Monroe, 232.

Meier *vs.* Portland Cable Co., 16 Oregon, 500.

McCormick *vs.* Baltimore, 45 Md. 524.

Cincinnati *vs.* White, 6 Pet. 431.

"The plan of the town showing no line separating the town from the Ohio, the inference is clear that it was intended to go and did go to the river."

Rowan's Executor *vs.* Portland, 8 B. Monroe, 239.

Louisville *vs.* Bank, 3 B. Monroe, 144.

Giltner *vs.* Carrallton, 7 B. Monroe, 680.

Maysville *vs.* Boon et al., J. J. Marshall, 224.

II.

There are three principal maps of the city of Washington: The Ellicott map, issued in 1792; the Dermot or Tin Case map, issued in 1795, signed by President Washington

March 2, 1797, and by President Adams July 23, 1798 (2 Vol. 646). The King map, issued in 1803.

The Ellicott map, the first one, is an engraved map, and is considered by some as the official map of the city. This is evidently a mistake. It was merely tentative, and was intended to embody simply the main features of the city and to be by no means final in all its details.

It was on too small a scale, and there were no detailed measurements of any kind upon it. It was not authorized by Congress (2 Vol. 450), and it was frequently changed.

4 Vol. 1561.
6 Vol. 305, 334.
2 Vol. 669, 670, 674, 678.

It is conclusively shown by the record that the commissioners had the power to change this map, and that they did so frequently. Their action of June 22, 1795 (4 Vol. 1595), in adopting the returns of December 24, 1793, of certain squares, instead of those of Major Ellicott, whereby they gave those squares a boundary on Water street instead of the Potomac river, and deprived them of riparian rights, shows that they possessed this power.

Also, when they called a meeting of the proprietors of Hamburgh and Carrollsburgh, on June 17, 1793, for the purpose of making a division and assignment of lots in those towns. 2 Vol. 671.

On that day the boundaries of Squares 63 and 89 were determined upon, and said squares were recorded with these boundaries unchanged in January, 1800. 3 Vol. 793, 700.

The Dermot map was authorized by an act of the commissioners on June 15, 1795. 2 Vol. 661, 668. 4 Vol. 1518, 1682.

This map was approved by Presidents Washington and Adams. President Washington refers to his approval of this map in his letter of March 3, 1797. 7 Vol. 2243. In

expressing his opinion in regard to this map Attorney General Lee, in 1798, said:

> "The plan to which the Presidents's signature is annexed is sufficiently authenticated and supersedes all prior plans." 4 Vol. 1610.

This plan is referred to in the report on Water Lots and Water Privileges made May 25, 1846, as:

> "The present plan of the city, which had then been 'properly authenticated' by the approval and signature of the President and the seal of the United States and except the change made under the act of Congress of May 7, 1822 . . . remains the same at this day."
>
> 7 Vol. 2306.

This map contains twenty-four squares more than the Ellicott map. 2 Vol. 667. 4 Vol. 1545. By it exchanges and sales of lots in the city were made to the commissioners. 2 Vol. 609, 633.

For the reason that it had been prepared by direction of the commissioners and received the signatures of Presidents Washington and Adams this map has often been considered the authentic map of the city of Washington.

4 Vol. 1750, 1754, 1787, 1794.

6 Vol. 334.

The King map was prepared by Nicholas King, surveyor of the city. It appears to have been prepared without any authority whatever and never to have been in any way recognized as an official map of the city of Washington. 2 Vol. 609. 4 Vol. 1517, 1518, 1564 and 1653.

In this respect it is very different from the Dermot map; and, while a much larger and handsomer map, it can not be said to be considered as authoritative or official.

Some attempt has been made to show that this was intended as a permanent map of the city, but the evidence

is wholly insufficient, being founded upon a presumption of the witness Stewart, based upon papers of very little importance in his office. 4 Vol. 1554. 4 Vol. 1680.

The Register of Squares is equally important, if not more so, than either of these maps in determining the official plans of the city of Washington.

It is described as two large volumes, in which all the returns, received while the commissioners were in office, were recorded; and in which the plats and certificates of division signed by the proprietors and commissioners were copied. 2 Vol. 637. 4 Vol. 1524. These returns contain the numbers of the squares and lots, and show which lots went to the original proprietors at the division of the squares, and the date of the surveyor's return and of the recording. 2 Vol. 645. 4 Vol. 1574–5.

The dates of the approval of the Dermot map by Presidents Washington and Adams is also entered in one of these volumes. 2 Vol. 646.

These are the only public records, which designate the lots given to the original proprietors and those taken by the United States Government, when the squares were first divided, and in which the boundaries of the different squares in the city are described in words and not in figures only.

The entries in these books are extensively relied upon by the Government as defining the boundaries of the squares on the river front between the Long Bridge and the Arsenal (Greenleaf's Point). 4 Vol. 1559, 1741, 1747, 1748.

Stewart, the witness of the Government, says of these volumes: "They have always been considered as valid and authentic books and records of the city." 2 Vol. 667–8.

It is, therefore, respectfully submitted that the record which contains the final act of the commissioners and in which the contract, made between them and the original proprietors in regard to the subdivision and boundaries of the different

squares, is the one to govern in every case, and that all other records which differ from this should be rejected.

"The general rule of law is," the court said:

> "That all preliminary negotiations and agreements are to be deemed merged in the final settled instruments executed by the parties, unless a clear mistake be established."

Steamboat Case, 109 U. S. 681.
McKinley *vs.* Williams, 36 U. S. App. 749.
Graham *vs.* Sadlier, 165 Ill. 95.
Savings Bank *vs.* Asbury, 117 Cal. 96.
Parsons on Contracts, 2 Vol. 548.

Therefore, having shown that Square 129 was recorded in the "Register of Squares" with its southern boundary described as the Potomac river, April 13, 1797, (3 Vol. 787) by the commissioners under a formal agreement with the original proprietor, and that it appeared with this boundary upon the Dermot map, we contend that this is the correct boundary of the square; and that it can not be changed or altered by the King map or any other map without the consent of the original proprietor or without due compensation.

Having shown that the boundaries of Squares 63 and 89 were determined upon at a meeting of the commissioners and the original proprietors, held June 17, 1793, and that these squares were recorded in the Register of Squares, as per return of that date, with the southern boundary described as the Potomac river in January, 1800, subsequent to the issue of the Dermot map, we contend that this is the correct boundary of these squares and should govern in all cases; and that it could not be changed without the consent of the original proprietors or without due compensation to them.

This action of the commissioners was taken in spite of the statements contained in the letter of Nicholas King of March 8, 1797, (4 Vol. 1602) and of the fact that his "ele-

gant and descriptive work" was then going on in their office. 7 Vol. 2247.

These squares seem to have been recorded not only with deliberation but with full knowledge on the part of the commissioners of all the surrounding circumstances.

III.

Additional evidence in regard to the existence of riparian rights in Squares 63, 89, and 129 may be obtained from the frequent mention of water lots in the record.

Justice Mathews says in his opinion (109 U. S. 692):

> "That there was on the original plan of the city and in the division made between the original proprietors and the United States a classification of the squares and lots into 'water lots' with riparian privileges, and the rest, which were not, admits of no dispute. The exact nature of which difference is well pointed out in a very elaborate report made May 25, 1846 (7 Vol., 2290–2314), to the common council of the city by a committee appointed to investigate the subject, and their conclusions on the point seem to us supported by the records and documents of the time."

This report says:

> "Squares in the water, with water lots, were laid off by the commissioners and divided with the proprietors on the navigable waters of Eastern Branch, Potomac and Rock Creek.
>
> "Water lots were defined by metes and bounds on three sides, and were estimated originally in the division, since in sales and now for assessment by the front foot." 7 Vol. 2312–13.

This description applies in every way to the lots in Squares 63, 89, 129, and 148, and to no other lots fronting on the Potomac river, and we may reasonably conclude that these were the lots referred to and mentioned.

Additional weight is given this conclusion by the position of the lots to which the description of "water lots" can be

applied. They are all situated near where three small towns were located when Washington was founded, to wit, Hamburgh, Carrollsburg and Georgetown.

Mention is made of this fact in the said report of May 25, 1846. In referring to these towns the report says:

> "At or near these three points only were water lots laid off by the commissioners and divided under the deeds of trust. There was not one marked along the shore of the Potomac from the mouth of the Tiber to Greenleaf's Point." 7 Vol. 2294; 6 Vol. 301.

Said report also shows that the commissioners "laid off and divided 'water lots' at Hamburgh and at Carrollsburgh." 7 Vol. 2299, 2310. Continuing, the report says:

> "That Mr. Adams caused the approval of President Washington to be annexed to the plan (the Dermot map) which now became finally established as the plan of the city, with all its squares, reservations, streets, and water lots, as completed and finished by the commissioners under the deeds of trust." 7 Vol. 2303.

There is also abundant evidence to show the existence of water lots in the report of William Elliot, April 2, 1835, and elsewhere in the record.

It is evident, therefore, that the commissioners intended to, and did make, certain lots in the city of Washington water lots with riparian rights.

It would be nonsense to contend that they did not.

That these lots were situated at or near Hamburgh and Carrollsburgh, and included the lots in Squares 63, 89 and 129, is also certain.

The condition of things existing in this small town of Hamburgh was so diffferent from that at any other point on the Potomac river, within the city limits, that the commissioners decided to leawe the lot holders there in the enjoyment of their original rights.

But whatever the reason was, it is certain that riparian

rights were not taken away from the original proprietors when these squares were divided, as was done in the other squares on the Potomac.

These valuable rights can not be taken from the shore owner by the Government without a positive grant or just compensation.

The situation of the lots in these squares makes it evident that they were given riparian rights. They were originally almost entirely under water and the water rights constituted their only value. It is, therefore, not to be credited that the original proprietor would surrender valuable properties and accept these lots as compensation for their claims, shorn of the only appurtenant that would make them of any value whatever.

In the original division these lots were bounded on the south by the "Potomac river," and consequently they were intended to keep that river always for their southern boundary and enjoy riparian rights as their main and characteristic feature.

It is for this reason that in the division of Squares 63 and 89 between the commissioners and the original proprietors, as recorded in the Register of Squares, lots were not laid off with their southern boundary under water as was done in the Dermot map; and, if the northern boundary of some lots in Square 89 was below the water line, it was necessary in order to continue Water street according to the map of the city and designate the spot where the water privileges of these lots should begin, and for no other purpose.

There was, moreover, in existence an elaborate system for building wharves on the river front by the proprietors of water lots. 4 Vol. 1627. 6 Vol. 180.

109 U. S. 675, 701.

This proves conclusively that such privileges existed, for it would be absurd to suppose that such regulations would

be made if no one had the right to build wharves, and there were no such things as water lots.

By the regulations for building wharves made on July 20, 1795 (6 Vol. 181), proprietors of water lots were required "to leave a space of sixty feet for a street at the termination of every three hundred feet of made ground;" the public to reimburse them for said streets when they were needed.

This evidently contemplated an extension of the city upon such ground as was reclaimed from the river, and shows that the right of access to the river was considered to belong to the owners of water lots.

The only restriction being, that they should leave a street of sixty feet at the termination of every three hundred feet of made ground, in order that the plan of the city might be substantially carried out. This ground, however, belonged to the lot holders, as it was to be paid for when needed for public use as streets.

Attorney General Wirt, in his opinion of July 7th, 1818, doubts the power of the commissioners to make this regulation, but admits the existence of water lots. He says (6 Vol. 344):

> "The mere purchase of water privileges does not necessarily include the right of wharfing. It gives the free use and enjoyment of the water, as it lies in its natural bed; but it gives no right to vary that bed, by erection of wharves or any other obstruction whatever."

This appears to be a plain acknowledgment of the existence of riparian rights and water privileges, such as are claimed for these three squares, and can not be considered in any other light.

IV.

The court below in deciding this cause, held (7 Vol. 2541), that—

> "The commissioners had no authority to bind the United States by any agreement on the subject.

> The territory within the District did not belong to them as a private domain to be given away at their will."

Similar to this contention is that of the Government, that the squares and lots, which fell in the water, were not included in the original deed of trust and belonged to the United States; and, if the original proprietors received squares and lots situated below the water line they received something which they were not entitled to and should be content, and not seek riparian rights.

While there is undoubtedly some foundation for this contention, it can not be maintained:

1. Because the commissioners were not authorized to receive valuable rights from the original proprietors and give nothing in return. The law contemplated an equal division and not a purely one-sided affair, as claimed in the opinion of the court below (7 Vol. 2539). Such would be the case if the commissioners were permitted to divide the lots in squares 63, 89 and 129 and give the original proprietors their share, deprived of riparian rights, which constituted their sole value.

2. Because it would be a direct confession through its attorneys that the United States had been guilty of fraud, and the contract would, therefore, be vitiated.

The error in this contention consists in confusing riparian rights with land covered by the water. They seem to be considered as one and the same. While the land covered by the water may not have belonged to the original shore proprietors, riparian rights certainly did.

The mere privilege of reclaiming a few feet of land under water can not be considered as an equivalent return for water privileges and riparian rights; and the argument should be dismissed as untenable and absurd.

The riparian rights of the land comprising Squares 63, 89, and 129 were either divided between the original proprietors and the United States or surrendered to the Gov-

ernment. No evidence of the latter action can be obtained from the acts of the original proprietors or from the circumstances existing at the time of the division. It is evident, therefore, that the riparian rights were divided, and that the original proprietors received their proper share.

V.

All changes made by the King map, which in any way tend to curtail the rights and privileges of the original proprietors in these squares, given them under the subdivision recorded in the Register of Squares, we maintain, are illegal and void, as being contrary to justice and equity and the clear terms of the contract of the original proprietors.

Justice Matthews says (109 U. S. 682):

> "The decisive circumstance in the present case, is that the United States became the riparian proprietor and succeeded to all the riparian rights of Notley Young, by becoming the owner in fee simple absolute of the strip of land that adjoined the river, and intervened between it and what remained to original proprietor, Notley Young, after the conveyance."

It may, with equal truth, be said that the decisive circumstance in regard to Squares 63, 89, 129 and 148, is that the United States did not become the riparian proprietor thereof and did not succeed to all the riparian rights of the original proprietors. But that the original proprietors retained riparian rights to the lots in these squares, assigned to them in the division, from the fact that said squares were divided with a boundary directly on the Potomac river and with no strip of land intervening between them and the river.

VI.

The claim of the Chesapeake and Ohio Canal Company to riparian rights and to the accretions in front of Squares 63, 89 and 129, so far as said claim is inconsistent with

and contrary to the rights of the holders of lots in said squares, as herein maintained, cannot be allowed.

Said canal company can not claim these rights under the Act of Maryland of 1784, incorporating the Potomac Canal Company—

Because said company never obtained by said act any right to build a canal upon or through the land now comprising said squares.

Because said company never condemned or occupied the said land for the purpose of a canal.

When the acts of Congress incorporating the Chesapeake and Ohio Canal Company were passed, in 1825 and 1837, the United States had parted with its title to the squares aforesaid, and the canal company did not acquire a title to any part of the said squares by reason of said acts of Congress.

Railroad Co. *vs.* Schurmeir, 7 Wall. 272.
Brown *vs.* Kennedy, 5 H. & J. 196.

The land and the riparian rights claimed by the canal company could not have been acquired by said company except by purchase or condemnation, and upon due compensation to the owners thereof. It does not appear that any portion of appellants' lots in these squares has been condemed or purchased by the said canal company except certain parts of Lots 2, 4 and 5, in Square 63. 3 Vol. 972–3

No part of Lot 1, in Square 129, was occupied by the said canal. 3 Vol. 769.

It is, therefore, plain that said canal company has no title to any part of appellants' lots in the said squares, except such portions of Lots 2, 4 and 5, in Square 63, which it purchased from the owners.

The mere fact that this company built its canal through a portion of Squares 63 and 89 does not give the company the fee simple to this land or the absolute ownership of it. The most it gave said company was the right to use said

land for the purposes of a canal; and when said use ceased, the land reverted to its former owner. 6 Vol. 131.

The claim of title by adverse possession, made by the canal company, is absolutely untenable. It does not, and never has, possessed the five elements necessary to create a title by adverse possession.

Bradshaw *vs.* Stott, 4 Ct. App. 527.
Ward *vs.* Cochran, 150 U. S. 597.

Moreover, as it is said in the opinion of the court below (7 Vol. 2535):

> "The corporation is the creature of its charter, which limits its powers and prescribes its duties. It was in no degree relevant to the objects of its creation that it should acquire riparian rights along the Potomac. The possession of such rights was scarcely more germane to its corporate functions than the cultivation of a farm or running a cotton factory. Again, this section of the canal has been destroyed, and almost obliterated, and has not been operated or used in any manner since about 1860. Letter of President Clark. Vol. 6 p. 131."

In the case of Illinois Central Railroad *vs.* Illinois, 146 U. S. 444, it was held that:

> "The act incorporating the company only granted to it a right of way over the public lands for its use and control, for the purposes contemplated, which was to enable it to survey, locate, and construct and operate a railroad.
>
> "It did not contemplate, much less authorize, any diversion of the property to any other purpose. The use of it was restricted to the purpose expressed."

There was no assertion of riparian rights or water privileges made by the canal company; no adverse possession maintained; or were wharves built by said company beyond the boundaries of its canal.

The lot holders and owners of these riparian rights knew that these appurtenances belonged to their lots and

could have made use of them at any time, without the consent of the canal company. Their rights were not lost by nonuser.

> "A man can not lose title to his lands by leaving them in their natural state without improvement or forfeit them by nonuser."
>
> Boston *vs.* Lecraw, 17 How. 436.
> McMurray *vs.* Baltimore, 54 Md. 103.
> Steamboat Case, 109 U. S. 684.

In the deeds made to the canal company conveying parts of Lots 2, 4, and 5, Square 63, the property transferred is strictly defined by metes and bounds. . 3 Vol. 972–3.

Lots 8 and 9, Square 63, were conveyed to William Easby—

> "except such parts of said lots as have been taken and are now held by the Chesapeake and Ohio Canal Company." 3 Vol., 817.

This shows conclusively the canal company paid for and acquired title only to so much of the lots in these squares as was necessary for the erection and maintaining of its canal.

It is, therefore, maintained that the Chesapeake and Ohio Canal Company, except in those lots which it purchased, is not in a position either to claim riparian rights to the lots in Squares 63, 89 and 129, or to dispute the position of the lot holders claiming those rights.

> "It is a right of which, when once vested, the owner can only be deprived in accordance with established law; and, if necessary that it be taken for the public good, upon due compensation."
>
> Yates *vs.* Milwaukee, 10 Wall. 504.
> Weber *vs.* Harbor Commissioners, 18 Wall. 65.
> Shively *vs.* Bowlby, 152 U. S. 14.

VII.

The claim of the appellant Morris and other appellants to the so called "Kidwell meadows" under the patent issued

to John L. Kidwell in December, 1869, cannot be considered a proper one and is no bar to the riparian rights claimed by these appellants as owners of the lots aforesaid.

1. The said patent was issued without authority of law and is null and void, because, as appears from the testimony of Jas. Edmunds (2 Vol. 411), the requirements of the law of Maryland, the orders of the Governor and Council of Maryland, and the orders and regulations of the Treasury Department, as promulgated under joint resolution of Congress of February 16, 1839, were not complied with.

It is submitted that this renders the patent voidable on account of fraud and irregularity as to the original patentee and as to all those claiming under the Kidwell patent, who take as the heirs of said patentee. This includes all of said claimants under the patent except the appellant, Martin F. Morris, who claims as a *bona fide* purchaser without notice.

It is further submitted, and the objections hereinafter mentioned are urged against the heirs of John Marshall, claiming under a grant by letters patent from Charles II to Lord Culpepper, as well as against those claiming under the Kidwell patent; that the rights of property in the soil in bed of the stream of navigable rivers were *jura regalia*, that these rights were delegated, by letters patent, to the original colonial proprietors, by the British crown.

Martin *vs.* Waddell, 16 Peters 367.

But, that, by the several proceedings by which the colonies declared themselves free, and under which they organized the State and Federal governments, this property in the soil in the bed of navigable rivers became vested in the State to be held in trust for, and not to be conveyed away, from the people.

Martin *vs.* Waddell, 16 Peters, 367.

Illinois Central RR. Co. *vs.* Illinois, 146 U. S. 387.

1 Kilty's Laws of Maryland, November, 1781, Chapter 20.

Therefore, as the patents issued to J. L. Kidwell purported to convey the Kidwell Meadows to the patentee in fee and for no public purpose or benefit, the said patent was void *ab initio* and the party claiming under it as a *bona fide* purchaser takes no title.

But this property in the soil of the bed of navigable rivers is, of course, held subject to the laws of the country relating to the water privileges of riparian owners and the doctrine of accretions, as is shown by the decisions already cited.

But, if said patent had been issued in accordance with the requirements of law, said patent can give to those claiming under it no right to the land lying in front of the lots belonging to these appellants; because, when this patent was issued, the United States had parted with all its rights and title in this land and could not have made a patent or conveyance of it to anyone.

This land, as we have seen, was an accretion to the mainland, and belonged to the lots bordering on the river in front of which it formed.

Railroad Co. *vs.* Schurmeir, 7 Wall. 272.
Brown *vs.* Kennedy, 5 H. & J. 196.

VIII.

The court below erred in its opinion of March 4, 1896, where it decided that the amount allowed for damages to the property of the estate of William Easby, situated in Squares 63, 89 and 129 was payable to "William Easby's heirs." 7 Vol. 2713.

This award should have been made payable to Rose L. Easby and Fanny B. Easby, trustees of the estate of said William Easby. They were made parties to this suit by agreement in such capacity on April 15, 1895, in place of John W. Easby, deceased (7 Vol. 2397), under and in obedience to the terms and provisions of the last will and testament of said William Easby. 3 Vol. 759.

The appellants represented the estate of William Easby

in the court below and looked after its interests. No one disputed their right to do so, or appeared in the case in behalf of said estate or of any interest therein.

They were the only parties to the record, representing said estate at the time said award was made, and the decree was evidently rendered through inadvertence and mistake.

If this award is distributed to the different heirs of William Easby, it will work a great injustice upon these appellants, because it will enable said heirs to receive their proportionate shares directly from the Government without being compelled to share in the expenses of the suit.

The attempt has been made on the part of the assignees of one of the heirs of William Easby to receive his proportionate share and escape expenses. 7 Vol. 2730.

Therefore, we contended, that whatever sum, if any, is awarded to the estate of William Easby for damages to the property of said estate in Squares 63, 89, and 129, should be made payable to the appellants, Rose L. Easby and Fanny B. Easby, trustees under the last will and testament of said William Easby, deceased.

It is, therefore, submitted that the decree of the court below should be reversed, and a decree passed to the effect—

First. That the lots in Squares 63, 89 and 129 extended to the Potomac river, and are entitled to riparian rights.

Second. That reasonable damages should be allowed to the owners of said lots for said riparian rights, and for the portions of said lots taken by the Government of the United States.

Third. That such damages, awarded for the lots in said squares belonging to the estate of William Easby, should be payable to the appellants, Rose L. Easby and Fannie B. Easby, trustees of said estate.

Respectfully submitted.

HENRY RANDALL WEBB,
JOHN SIDNEY WEBB,
Counsel for Appellants.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1898.

No. 49.

MARTIN F. MORRIS ET AL.

vs.

THE UNITED STATES.

BRIEF FOR DANIEL S. EVANS, APPELLANT.

Daniel S. Evans is the owner of square south of Square No. 415, claiming under Notley Young.

His brother, John O. Evans, from whom he inherited the property in 1872, built a sea wall along the entire water front of this square and a stone wharf 69 feet wide by 175 feet long, at large expense.

The answer of this appellant to the bill is in Record I, p. 253; and the evidence in respect of ownership and possession, etc., is in Record III, pp. 1029 to 1042.

This appellant respectfully submits his appeal on the assignment of errors and brief of Messrs. Calderon Carlisle and William G. Johnson, attorneys for the appellants, Willis et al., filed herein.

WM. F. MATTINGLY,

For Daniel S. Evans, Appellant.

No. 49.

FILED
OCT 24 1898
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

Brief of Selden for Appts.

October Term, 1898.

UNITED STATES,
APPELLEE,

vs. No. 49.

MARTIN F. MORRIS, ET ALS.,
APPELLANTS.

On Appeal from the Supreme Court of the District of Columbia.

Brief for the Heirs of Moncure Robinson, Deceased, and others, and for the Washington Steamboat Company, Limited. (Claimants in Respect to Certain Lots in Squares 472, 473 and 503, respectively.)

JOHN SELDEN,
Counsel for such Claimants, Appellants.

WASHINGTON, D. C.:
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Filed Oct. 24, 1898

Supreme Court of the United States.

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Errata.

Many typographical and other errors have not been corrected, because they are self-explanatory.

Synop. vii, line eleven from top, read "5" for "4."
xxvi, line five from bottom, for "121" read "p. 121."

On page 23, line six from bottom, read "be" for "become."

On page 64, line three from top, read "hands" for "lands."

Same page, line four from top, read "De" for "de."

On page 78, line eleven from top, read "had" for "has."

Page 87, line five from bottom, for "£25, or $66.66\frac{1}{3}$" read "£35, or $93.33\frac{1}{3}$."

On page 91, line fourteen from top, read "Deseret" for "Desoret."

On page 105, line ten from bottom, read "later" for "latter."

On page 124, line fifteen from bottom, insert after "words," "'*water front*' *than by the adoption of the words.*"

On page 126, line thirteen from bottom, read "has" for "had."

On page 168, line eight from top, read "part of" for "residue."

On page 169, at end of seventh line from bottom, strike out quotation mark.

On page 171, last line, read "2" for "4."

On page 182, line nine from top, read "lots" for "lot."

On page 193, at end of third line from top, insert quotation mark.

On page 203, line five from top, read "Ellicott" for "Elliot."

On page 221, line thirteen from bottom, for "streets," read "highways."

On page 233, line twelve from top, omit quotation mark after "that."

On page 240, bottom line, read "channel" for "canal."

On page 264, line ten from bottom, read "Elliott" for "Ellicott."

On page 279, line nine, insert "the" after "in."

On page 280, line eight from bottom, read "this Court" for "the same Judge."

On page 289, line eleven from top, read "Joseph H. Bradley" for "Joseph Bradley."

On page 305, omit one line note at bottom of page.

On page 311, line six from top, for "2393" read "2394."

On page 317, third line in first note, before the word "o," insert the words "in the upper."

On page 318, line second from bottom, omit "*Appx. to Def's Arg.* 93."

On page 322, line thirteen from bottom, for "34" read "44."

On page 334, commencement of note, read "At" for "Act."

On page 336, line eleven from bottom, after the word "of" insert "21."

On page 341, line six from top, insert "had," before "conceded."

On page 351, for last line, read "The ordinance, approved July 29, 1819, enacted."

On page 361, line three from top, omit quotation mark.

On page 368, commencement of line four, for "certain," read "had been acquired by."

On page 371, line nine, for "11" read "1."

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4. *On or before the date of the above Agreement, fifteen, at least, of the* 18, *squares, in the land of Young which were situate nearest the Potomac, had, hence, been returned bounded by Water Street.* p. 104.

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5. Probable reasons for the *alteration*, on December 24, 1793, of the boundary towards the river, of the six squares returned on June 15, 1793. pp. 104–106.

6. Of the Agreement, December 24, 1793, between Commissioners and Morris and Greenleaf, to the effect, that these latter shall have, (with the exception of 132 enumerated squares,) "*the part of the city in Notley Young's land,*" and providing, that they "are entitled to the lots in Notley Young's land

and, of course, to the privilege of wharfing annexed thereto, and that lots lying on the canal are *not reckoned water lots.*" pp. 106–107.

7. Inadmissable interpretation, that Agreement contemplated, that, in above 8 squares, returned, prior to its date, as bounded by Water Street, the operation of the Agreement, as to such squares, would be defeated *by the existence and intervention of that street.* p. 107.

8. Impossible conception, that to render the Agreement *uniformly* inoperative and delusive, the Commissioners, on the date of the Agreement, caused 7 other squares in the land of Young to be likewise returned, as bounded, towards the river, by Water Street. pp. 107–108.

9. Observation of Mr. Chief Justice Marshall, in 3 Cranch, 70–71. p. 108.

10. Nation entering into contract with individuals, since Justice is immutable, bound by the rules applicable to contracts between private persons. pp. 108–109.

11. Observations of Sir William Scott, in The Maria, 1 Rob. 295–296. pp. 109–110.

Peculiar Language of Contract, December 24, 1793, Between Commissioners and Morris and Greenleaf. p. 110.

1. Contemporaneous construction of such language by Commissioners, in case of *John Templeman*. pp. 110–112.

2. *Contemporanea expositio est fortissima in lege.* p. 112.

3. Maxim applied to language of Contract of December 24, 1793. p. 112.

Of the "Fair and Equal Division" Required by the Deed of Trust from Notley Young. p. 113.

1. Under the deeds of trust from the original proprietors, "*a fair and equal division*" was to be made of the building lots or squares. p. 113.

2. Necessary, hence, to observe equality in the division of lots, or squares, which, from their situation towards the Potomac were supposed to possess riparian privileges, as well as in the division of upland lots or squares, supposed to possess no such privileges. p. 113.

3. *Illustrations*, in particular instances, of this method of division by the Commissioners. pp. 113–118.

4. Like method of division observed in respect to the 18 squares in the land of Notley Young which fronted on Water Street. pp. 118–119.

5. Folly of *dividing squares by water fronts*, if squares supposed to have no such fronts. p. 119.

6. Under deeds of trust from original proprietors, *streets*, to pass to Government free of charge. p. 119.

7. *This*, (4 Pet. 280,) on the theory that the streets would be equally beneficial to the original proprietors and to the public. p. 120.

8. It was supposed by Mr. Jefferson, that, in surrendering the streets for nothing, the proprietors would receive, instead of £25, only about £19, per acre, for their lands. p. 120.

9. Logic of position now asserted by Government, that Water Street not only of no benefit, but of direct injury, to proprietors abutting on that street. p. 120.

Of Division Book No. 1.

The ill-considered change made in the title of this volume, by its present custodian. pp. 120–121.

The objections taken to this volume, in 109 U. S. 681. 121.

1. *By the present record*, the volume shown to be as well authenticated as any other volume relating to the early affairs of the City. p. 121.

2. Duty of Commissioners, under act of Maryland of

December 19, 1791, Sec. 7, to appoint a clerk to keep a book *like* Division Book No. 1. pp. 121–122.

3. *Some* record was indispensable, to show the quantity of land falling, on division, to the original proprietor, on the one hand, and to the public, on the other, and—if water frontage formed part of the calculation—the proportion of such frontage due to each. p. 122.

4. The *Registers of Squares* do not set forth the contents of the squares they embrace. p. 122.

5. The number and order of the squares in Division Book No. 1, are the number and order of the squares in the Registers of Squares. p. 122.

6. Necessity of recalling previous explanation of the course pursued by and under Commissioners, in the ascertainment, division, and registration of squares, in order to account for delay in preparation of Division Book No. 1. p. 123.

7. Division Book No. 1 contains the frontage of *no square which lies not on or towards the water*. And for *this*, the reason would seem, unless, indeed, to the witness, *Stewart*, to be plain. p. 123, and *note*.

8. Division Book No. 1, *water-marked* 1795, contains marginal references to volumes no longer existing, and to others which are supposed to be identified. p. 124.

9. Of the Book of "Calculations and Divisions, 1794 to 1800, No. 1," *water-marked* 1801, thus supposed to be identified. p. 125.

10. Of the Sale Book supposed to be referred to in Division Book No. 1, and of other supposed Sale Books.

11. Of the deductions drawn by the witness, Stewart, from certain Notes made in Division Book No. 1. p. 126.

12. Comparison drawn, in reference to squares, and also, as to alterations in titles, between the Book of Calculations and Divisions and Division Book No. 1. p. 126.

13. *Water front* to squares 472 and 473, two of the squares with which this Brief is directly concerned, and also, to squares 233 and 270, assigned in Book of Calculations and Divisions as well as in the Accounts kept by the Commissioners between themselves and Notley Young, or his heirs. p. 126.

14. Chaos, from loss, in the records of the Commissioners. pp. 126–127.

This Court will not expect the citizen to stand insurer of the Government records, but will be satisfied when he produces *the best evidence obtainable*, in the face of loss. p. 127.

PRIVILEGE OF WHARFING ACQUIRED BY MORRIS AND GREENLEAF, UNDER AGREEMENT OF DECEMBER 23, 1793, NOT EXTINGUISHED BY CERTIFICATE GRANTED TO GREENLEAF ON OCTOBER 18, 1794. p. 127.

1. Under the *deeds of trust*, original proprietors, for squares to them falling, on division, were to receive conveyances *from the Trustees*, but, *under act Maryland*,

December 19, 1791, Sec. 3, the original proprietors were to be *remitted* to their former titles, as if such conveyances had actually been made. pp. 127–128.

2. Hence, as to such squares, the certificates of division state merely, in effect, that the squares, are to "*remain*" to the original proprietors. p. 128.

3. If the privilege of wharfing *severed*, in law, from such of those squares as fronted on Water Street, by intervention of that street, parties might still contract for the continuance, in fact, of the connection between the squares and such right. p. 128.

4. At common law, *remitter* to the land, *remitter* to the appurtenance, though the latter had been *severed*. pp. 128–129.

5. Preamble to act Maryland, December 19, 1791, declares "that *an incontrovertible title* ought to be made to the purchasers, *under public sanction*." p. 129.

6. Titles, under 4 Hen. VII, cap. 24, barred, after *five* years, through fines with proclamations. p. 129.

7. Under sec. 5, act Maryland, December 19, 1791, purchase, made from one claiming title, and for *five years next before the enactment*, in possession, personally, or through those under whom he claimed, to carry good title. p. 130.

8. Under the *deeds of trust*, lots sold by the Commissioners were to be conveyed *by the Trustees*, to the purchasers, in fee, "*according to the terms and conditions of*" their purchases. p. 130.

9. In Sec. 5, of that act, it is provided, that the lots "*shall remain and be* to the purchasers, *according to the terms and conditions of their respective purchases.*" p. 130.

10. *Title to purchaser, according to the terms and conditions of his purchase*, fundamental requirement, both in deeds of trust and in the Statute. p. 131.

11. Requirement to be met, under *deeds of trust*, through conveyance of *legal title* by the Trustees. p. 131.

    Requirement, under Sec. 5 of the Act of Maryland, December 19, 1791, accomplished by creation of *equitable Statutory title*, upon the completion of the purchase, and according to the terms and conditions thereof. p. 131.

12. Observations of Mr. Attorney General Cushing, upon essential change wrought by that act, in the method of vesting title in purchasers, contemplated by deed of trust. p. 131.

13. Under above provisions of deed of trust and of Act of Maryland, 1791, Morris and Greenleaf became purchasers of public lots in the land of Notley Young, "*and, of course,*" of "the privilege of wharfing annexed thereto." p. 131.

14. Trustees made no conveyance of lots to Morris and Greenleaf, nor, until November 30, 1796, any to Commissioners. pp. 131–132.

15. Act Maryland, 1791, dealt not, in favor of purchasers, with *legal title outstanding in Trustees.* p. 132.

16. Legal title being outstanding in Trustees, and purchaser having, thence, only equitable title, interest of purchaser *not subject to dower, liable to execution* nor such as to maintain *ejectment*. p. 132.

17. Intolerable inconveniences of an *equitable estate*, only, in the purchasers, and a *legal estate* in the Trustees. p. 132.

18. Of the mass of conveyancing by the Trustees, to purchasers and their vendees, requisite to remove such inconveniences, by ordinary methods. p. 132.

19. As, by sec. 3, act Maryland December 19, 1791, *legal estate vested in* Trustees, of persons incompetent, or omitting, to convey, as Young and others had conveyed, so, means might be found, by legislation, to *divest* Trustees of legal estate. pp. 132–133.

20. Of Stat. 27 Hen. VIII, cap. 10, that when one was "*seised*" of *lands* to the *use* of another, the latter should "stand and be *seised* of" such lands, as he had been of their *use*, and that the *legal estate* of him "*seised*" to the use, should become transferred and vested in him in whom the use had resided. p. 133.

21. Analogous, was the act of Maryland, December 28, 1793, Sec. 1, under which the recorded certificates of purchases, granted by the Commissioners, were rendered, "sufficient to vest *the legal title* in the purchasers," in fee, "*according to the import of such certificates.*" pp. 133–134.

22. As Act of Maryland, December 19, 1791, Sec. 5, intended no interference with *legal title* outstanding in

Trustees, so, Act of Maryland, December 28, 1793, intended to operate on *no other title*. p. 134.

23. Of O'Neal's Lessee *v.* Brown, 1 Cranch, C. C. 69, construing Act of Maryland, December 28, 1793, sec. 1. pp. 134–135.

24. No power, of course, in State of Maryland, to impair obligation of Agreement under which, on December 24, 1793, Morris and Greenleaf became purchasers, in connection with lots in Young's land, of the *privilege of wharfing*. pp. 135–136.

25. Surrender of that privilege, by Morris and Greenleaf, to be established only, by *proof of their consent*, express or implied. p. 136.

26. No *express* consent. p. 136.

27. Implied consent, sought by the Government to be deduced from acceptance by Morris and Greenleaf, of new instrument from Commissioners, supposed to be inconsistent, in legal effect, with terms and continuance of original Agreement. pp. 136–137.

28. Position understood to be taken by Government, stated, in this connection. pp. 136–137.

29. Of the matters involved in such position, which the present appellants concede. p. 138.

30. Of questions which such concessions, nevertheless, leave open. p. 138.

31. Recorded certificate, of October 18, 1793, from Commissioners to Greenleaf, to effect, that he had *theretofore* purchased, and had fully paid for, 857 lots,

whereby, and by virtue of the certificate, and of the Maryland *act, in such case made and provided*, he was *legally entitled to* and "*seised of*," such lots, in fee. pp. 138–139.

32. Expression "seised of," taken from 27 Hen. VIII, cap. 10, cited above. p. 139.

33. Maryland act intended in certificate, that of December 28, 1793, transferring *legal estate* from Trustee to purchasers, in analogy to what was accomplished under 27 Hen. VIII, cap. 10. p. 139.

34. Certificate deals only with *legal title* outstanding, at its date, in the Trustees. pp. 139–140.

35. Such certificate, in general, substantially responsive to terms of purchase, and, hence, acceptable to buyers. p. 140.

36. But certificates designed to aid—not to impair—equitable statutory estate of purchasers, by adding the *legal title* thereto, *in same manner as if such title were actually conveyed by the Trustees, pursuant to requirements of deeds of trust.* pp. 140–141.

37. *Deeds of trust* require Trustees to convey, in fee, to purchasers, *according to the terms and conditions of their respective purchases.* p. 141.

38. Conveyance to which Morris and Greenleaf entitled *from the Trustees*, conveyance, in effect, with the lots, *of the privilege of wharfing also.* p. 141.

39. Certificate of October 18, 1794, to Greenleaf, being intended *as the equivalent* of the conveyance which,

under the deed of trust, Morris and Greenleaf entitled, by reason of their purchase, to receive from the Trustees, *should be construed accordingly.* p. 141.

40. Legal title, under act of Maryland, December 28, 1793, to vest, "according to the *import*" of certificate, and *hence*, according to the operation, *in law*, of the instrument. pp. 141–142.

41. Though certificate does not, in terms, transfer with the *legal title* to lot, the privilege of wharfing, also, privilege not intended to be left, in equity, in the purchasers, and, at law, outstanding in the Trustees. p. 142.

42. Not necessary, however, to *mention* wharfing privilege, nor to employ, even, the word "*appurtenances.*" p. 143.

43. Whether particular right, or easement, passes by given instrument, determinable from terms of instrument, and practical incidents belonging to land, when instrument executed. p. 143.

44. *Parol evidence* competent, to assist this determination. p. 144.

45. In dealing with rights on Water Street, purchased in a prior century, and 36 years before *fee* in street held to vest in Government, great regard to be bestowed upon ancient conditions. p. 145.

46. Nature of appurtenance not such as to imply, of necessity, immediate physical proximity. p. 146.

47. Riparian privilege an incorporeal hereditament. p. 146

48. Incorporeal hereditament, often owned by one man; the things corporeal, with which it is connected, often by another—*cum exemplis.* p. 146.

49. So, privilege of wharfing from south side of Water Street, *might* belong to lot owners, on north side of street, though street itself might be understood to belong to Government. p. 146.

50. Such privilege of wharfing, in this view, might be an *easement.* p. 147.

51. Claim to this privilege, involves no claim to the extension of the true boundaries of the squares, in connection with which the privilege is asserted. p. 147.

52. Easement implies existence of *servient,* as well as of dominant, estate. p. 147.

53. Physical proximity between the dominant and servient estates, unnecessary. p. 148.

54. Maxim, *that land cannot be appurtenant to land,* in nowise contradicted, by claim of owners of lots on north side of Water Street, to privilege of wharfing from south side of that street. p. 148.

55. *Soil and freehold* of street, essentially different from easement in street. p. 149.

56. Observations upon the *jus disponendi,* in general. p. 149.

57. An individual may separate his *upland* from his *flats,* by alienating the one without the other. p. 149.

58. Recognition, by Congress, of kindred right of owner, at Georgetown. pp. 149–150.

59. So the Government might retain title to Water Street, and dispose only of the riparian privilege, if any, connected with that street. p. 150.

OF THE STRICTNESS OF THE RULE, IN THIS COURT, IN RESPECT TO APPURTENANCES AND EASEMENTS. P. 151.

1. How far such strictness might have been known in Maryland jurisprudence, a century ago. p. 151.

2. Of what was taken to be the principle, *temp.* Coke, and when Blackstone published his Commentaries. pp. 151–152.

3. Character of the incident—its accustomed use with relation to, and necessity and fitness for the convenient and advantageous enjoyment of—the principal—formerly supposed to constitute the ground of legal connection. p. 152.

Of *squares* described by the Commissioners as "attached," or "appertaining" to, or included in, each other, and of conveyances of *wharfs, wharfing privileges, water rights,* &c., as belonging, appertaining, attached, &c., to lots fronting on Water Street. pp. 152–153.

Concessions, in colonies, to owners of shore, of right to erect wharves,—whatever terms the concessions might take—were still substantial *rights of property*. p. 153.

If lots on Water Street entitled to wharfing privileges, immaterial whether privileges be, or be not, technically describable as "appurtenances," or "easements." pp. 153–154.

Effect, under *some* name, will be given to such privileges, if they are found to exist. p. 154.

Common Connection, in fact, Existing in Maryland and at Georgetown, Between the Riparian Privilege and Lots Between Which and the Water a Street Intervened. p. 155.

1. *Means of access to and departure from, wharves, by land, indispensable, in practice, as like means, by water.* p. 155.

2. What was done at Georgetown. pp. 155–156.

3. No inference, from legislation, in 1785, reserving, at Georgetown, riparian privileges to owners of lots on north side of Water Street, that such legislation was more than *precautionary*, since, at that period, dedication of *street*, understood, in general, to imply grant of *easement*, merely. pp. 156–157.

BUILDING CONDITIONS OF AGREEMENT OF DECEMBER 24, 1793, NOT UNDERSTOOD TO BE DISTURBED, IN LAND OF YOUNG, BY CERTIFICATE OF OCTOBER 18, 1794. P. 158.

1. Of conditions, in Agreement of December 24, 1793, for the erection of buildings, prior to the removal, in December, 1800, of the seat of Government to the Potomac. pp. 158–159.

2. Of the modification, on April 24, 1794, of those conditions, as to the land of Young, so as to secure their performance *by bond*, instead of by *the retention of the legal title* to the public lots in that land. pp. 159–161.

3. Observance, by Morris and Greenleaf, in 1795–1797, of building conditions of the Agreement, as to *three* of those five squares, on Water Street, in the land of Young, which were embraced in the certificate of October 18, 1794. pp. 161–162.

4. Of such observance, as to square 503, one of such five squares, and, also, one of the squares particularly represented in the present Brief. pp. 162–163.

5. Of such observance, as to squares 270 and 300, two of such five squares. p. 163.

6. Of further observances, by Morris and Greenleaf, of the building conditions of the Agreement. pp. 163–164.

7. In after years, Commissioners forced to abandon restraints placed on purchasers, *by conditions to build*. p. 164, *n*.

8. Obligations, under agreement, of Morris and Greenleaf, *for building*, not deemed by Commissioners impaired by certificate of October 18, 1794. 165–166.

PRIVILEGE OF WHARFING, ACQUIRED UNDER AGREEMENT, IN CONNECTION WITH LOTS IN THE LAND OF NOTLEY YOUNG, WAS NEVER CONCEIVED BY THE COMMISSIONERS TO HAVE BECOME EXTINGUISHED, OR AFFECTED, BY CERTIFICATE OF OCTOBER 18, 1794. p. 166.

On the contrary, the Commissioners repeatedly turned to Agreement, to interpret rights of Morris and Greenleaf. p. 166.

1. Purchases by Morris and Greenleaf, made in most desirable localities, and, under express agreement for riparian ownership in connection with public lots in land of Young. pp. 166–167.

2. Morris and Greenleaf, under Agreement, excluded from "water lots," in general, (lots *on canal*, however, not to be so reckoned,) but, expressly "entitled to the lots *in Notley Young's land, and, of course, to the pivilege of wharfing annexed thereto.*" p. 167.

3. *Exclusion, in general*, not less explicit, than *inclusion, in particular*. p. 167.

4. *This*, recognized by Commissioners. pp. 167–168.

5. Besides certificate of October 18, 1794, three other certificates, for 2,000 lots, in the aggregate, granted

to Greenleaf by Commissioners, and selections, under such further certificates, not completed before Jan. 31, 1797. p. 168.

6. Principle established by Commissioners, as to "*water* lots," when claimed under such further certificates, was to adhere to terms of Agreement of December 24, 1793, as excluding right to "water lots," *except in the land of Notley Young, and on the Canal.* p. 168.

7. Firm and reiterated applications by the Commissioners, of this principle, with its conceded exception, early in 1795, to claim, under Greenleaf, of *Thomas Johnson*, to "Water property" in square W. of 4, situate on Rock Creek, and, hence, beyond the land of Young. pp. 169–171.

8. Principle, with its admitted exception, illustrated by the communications addressed by the Commissioners to Duncanson, on Sept. 2, and Sept. 4, 1795. pp. 171–172.

CONSTRUCTION OF THE CERTIFICATE TO GREENLEAF, FURTHER CONSIDERED. PP. 172–175.

1. To expound correctly the instrument finally executed between the parties, the court may consult an antecedent written agreement into which they have entered. p. 172.

2. The contract with Morris and Greenleaf, the certificate

issued to the latter and its ratification by the former, are but parts of a single transaction, and should be construed together. pp. 172–173.

3. Authorities for last above. pp. 173–175.

WHARFING REGULATIONS OF JULY 20, 1795. PP. 175–176.

1. The terms of these Regulations. p. 175.

2. Their object and the contract they created. p. 176.

3. Their resemblance to provisions elsewhere adopted. p. 176.

4. Policy, in like case, of *New England*, and of other States on the Atlantic. pp. 176–177.

5. Of *Boston*. p. 177.

6. Of *Charleston*, (South Carolina.) pp. 177–178.

7. Of *Maryland*. pp. 178–187.

(a.) *Annapolis*. pp. 178–179.

(b.) *Chestertown*. pp. 179–180.

(c.) *Charlestown*. pp. 180–181.

(d.) *Baltimore*. pp. 181–185.

Maryland decisions upon rights at Baltimore. pp. 183–184.

Unguarded comment, of *this* Court, upon *Hazlehurst* vs. *The Mayor*, 37 Md. 215. p. 184, *note*.

(e.) *Georgetown*. pp. 185–187.

(f.) The maps which exhibit it. pp. 186–187.

(g.) *Linthicum v.* Ray, 9 Wall. 241, decided without the attention of this Court being brought to a statutory and prime feature in the controversy. p. 187.

(h.) Importance of weighing the action at this last place. p. 187.

WHARFING REGULATIONS OF JULY 20, 1795, FURTHER CONSIDERED. PP. 187–191.

1. Commissioners at the time of these Regulations. p. 187, *n*.

2. Elaborate report thereon by the Commissioners to the President, on July 24, 1795. pp. 187–190.

3. Regulations held by the Commissioners, under further advisement. pp. 190–191.

4. Though, by sec. 12 of Act Maryland of December 19, 1791, *Commissioners* empowered to license the building of wharves, Commissioners obtain, nevertheless, the sanction and approval of the first President, to the Regulations of July 20, 1795. pp. 190–191.

5. Construction, if any, immediately placed on these Regulations, by the Commissioners, unascertainable from the records of their Proceedings, which, from July 31, 1795, to October 24, 1796, *are lost*. p. 191.

WATER STREET, UNDER THESE REGULATIONS, LARGELY CONSTRUCTED BY THE OWNERS OF WHARVES.

1. Of the correspondence between the Commissioners, touching the terms of these Regulations. pp. 192–193.

2. Practical necessity, under these Regulations, to become, if builder of a wharf, constructor of a street behind it. pp. 193–194.

PRESENT SITE OF WATER STREET FORMERLY LARGELY COVERED BY THE POTOMAC.

1. Reclamation of site for that street, important object of Regulations. p. 196.

2. Of the high bluff, washed by the Potomac, between the Long Bridge and the Arsenal, and the impossibility of travel, at high tide, along the base of such bluff. pp. 196–197.

3. How present site of Water Street, opposite squares 472 and 356, formerly submerged. pp. 197–198.

Of the *Boshke*, (unofficial,) Map of 1857, and of what appears therefrom. pp. 200–202.

4. Of what is shown by the grade books of Nicholas King, prepared in 1797. p. 202.

5. Of the *meanders* of the Potomac, shown in front of the land of Notley Young. p. 202.

6. Of the actual location, in early times, of the Water Street boundary of squares, 472, 473 and 503, being those specially represented in the present Brief. pp. 202–206.

THE LOT-OWNER WHO CONSTRUCTED A WHARF OPPOSITE HIS PROPERTY, CONSTRUCTED, ALSO, A STREET OPPOSITE HIS PROPERTY.

1. *Of the evidence upon the proposition last above.* pp. 206–210.

2. Potomac *Steamboat* Company filled in Water Street, opposite lot 1 in square 473 and lot 11 in square 503. pp. 207–208.

3. Potomac *Ferry* Company did the like, opposite its lots in square 473. p. 208.

4. *William A. Bradley*, opposite his lots in square 356. p. 208.

5. *Lambell*, opposite square 390 or 391. p. 208.

6. Page, opposite square 472. p. 208.

7. Other instances. pp. 209–210.

8. In what manner and at what periods, Water Street, thus reclaimed from the Potomac by private enterprise, has been improved by public authority. p. 210.

AS TO "WATER LOTS," POSSESSING RIPARIAN PRIVILEGES.

1. Adoption, by this Court, (109 U. S. 692,) of definition

given, in 1846, by Committee of Police, of the lower Board of our City Councils. p. 211.

2. Wharfing Regulations of July 20, 1795, apply to *Potomac* as well as to the Eastern Branch. p. 211.

3. Most land, in the City, washed by Potomac, land of Notley Young. p. 211.

4. License, on March 5, 1795, to Notley Young, to build wharf on Potomac, and erection, under such license, of wharf opposite part of his square No. 472. p. 211.

5. All squares, toward water, in land of Notley Young, bounded by Water Street. p. 212.

6. Squares, toward Potomac, *not* bounded by street, few in number and ineligibly situated. p. 212.

7. As to the larger number of squares nearest Eastern Branch, a street lay between them and that stream. pp. 212–213.

8. No reason for excluding squares in Notley Young's land, from privileges conceded to less central and desirable localities. p. 213.

9. Regulations of July 20, 1795, in terms embrace "water lots" between which and the stream a street intervenes. p. 213.

10. Last position above, further examined. pp. 213–215.

11. "Water lot" no more meant, nor means, a lot situate in whole, or part, in water, than Water Street meant, or means, a highway, in whole, or part, submerged. p. 215.

12. Why Commissioners altered original draft of Regulations, from "*property lying on the water*" to "*water lots.*" pp. 215–217.

13. "Water lot" on the Potomac, one between which and that river, no *fast land* intervened. p. 217.

14. Illustrations, as to Potomac. pp. 218–221.

15. Illustrations, as to the Eastern Branch. pp. 221–229.

16. Inference drawn by this Court, in 109 U. S. 688–689, as to correspondence between Barry and the Commissioners in 1795, in respect to square 771 and Georgia Avenue, not supported by the present record. p. 223.

17. Purchase by General Washington, in square 667, and his devise of lots therein as "water lots." pp. 225–226.

18. *Blunder* imputed to General Washington, in 1846, by *Committee of Police*, of the lower Board of our City Councils. pp. 226, n.

19. Of Public "water property," within the City, as, from time to time, reported by the Commissioners to the President. pp. 229–232.

20. Of "*Water lots*" on the plan of William Elliott, adopted by the City Councils, and approved by President Van Buren, in 1837. p. 232.

21. Of *Water lots* on Water Street, as shown in the license granted, October 15, 1874, by modern Commissioners of this District, to Upper Potomac Steam-

boat Company, one of the appellees in 109 U. S. 672. p. 232.

22. Of "*Water lots*," on Water Street, recognized in void licenses granted by the Chief Engineer of the Army, between 1881 and 1884, to individuals. p. 233.

As to "Water Lots" Being Such Only as Were Sold By the Front Foot.

1. No lots, at the Federal City, were ever sold *by the front foot*, until some months after the Contract of December 24, 1793, whereby the Commissioners had parted with the most desirable of the public water property. p. 233.

2. Proposition last above, demonstrated, by reference to the evidence. pp. 234–236.

3. It was the magnitude of the sale of public water property, under this Contract, that led to the adoption of *the front foot*, as the basis of subsequent sales. p. 236.

4. Is that Contract, after the lapse of more than a century, to be read in the light of conditions resulting from the Contract itself? p. 236.

No intimation anywhere, in Record (*except*—if such be an exception—from Dermott), *that annexation of the privilege of wharfing to any lots laid off from land of Young,*

was ever, at any moment, controverted or questioned by public authority, or private voice, from December 24, 1793, *down to the agitation begun by Force, in* 1835, *more than forty years after.* p. 237.

(1.) Confused and erroneous conjectures of Dermott cited and remarked on. pp. 237–239.

(2.) None of such conjectures, however, pertinent to squares 472, 473 and 503 represented, particularly, in the present Brief. p. 239.

EARLY CLAIM AND EXERCISE OF RIPARIAN PRIVILEGES IN TWO OF THE THREE SQUARES REPRESENTED IN THIS BRIEF.

1. Wharf erected, under license of March 5, 1795, by Notley Young, opposite part of his square, 472. pp. 239–240.

2. This wharf shown on Washington Map, 1797, and by representation and enlargement, still standing. *Id. Ib.*

3. Conveyance, May 13, 1796, by Greenleaf, of part of square 503, (now lot 12,) "*with the right of wharfing* according to the rules of the City." p. 240.

4. Wharf erected, prior to Sept. 30, 1796, (and acqn red by Nicholson,) in part of square 503, (now part of lot 14.) p. 240, p. 242.

5. Of request, Sept. 30, 1796, from Nicholson, that Com-

missioners cause report to be made, of conformity of such wharf, with Building Regulations of July 20, 1[illegible]. pp. 240–241.

6. Of t[illegible] order from the Commissioners, prior to October 5, 1796, to Ralston, surveyor, to make report, accordingly. p. 241, n.

7. Of the wise and important observations addressed to the Commissioners, in 1796–1797, by N. King, successor, as surveyor, to Ralston, touching the futility of those Regulations, and the impracticability of compliance with the order. pp. 241–242, n.

8. Of the inconsiderate silence of the Commissioners, notwithstanding the repeated appeals of N. King, for guidance. *Id. Ib.*

9. His letter, April 15, 1797, transmitting survey and plan of wharf, but announcing his inability, upon grounds previously laid before the Commissioners, to comply with their order. *Id. Ib.*

WASHINGTON MAP OF 1797.

1. Unavoidable confusion in the plan of the city, from frequent changes in the surveyors. pp. 243–244.

2. April 9, 1793, form of returns by surveyor, prescribed by Commissioners. pp. 244–245.

3. *Platting and division* of squares, returned by surveyors, confided to *James R. Dermott.* p. 245.

4. Of *Dermott* and his unfriendly relations with the surveyors. p. 245 and *n*.

5 *Dermott*, June 15, 1795, directed to prepare a plan of the City, with delineation thereon of the public appropriations. p. 246.

6. He had nothing to do with admeasurements upon the ground, but took his data from the field returns of surveyors. pp. 246–247.

7. First President (March 2, 1797,) requests conveyance from Trustees to Commissioners of *streets* and *public appropriations*, according to the plan of Dermott, mentioned as "*annexed*" to such request. pp. 247–248.

8. Plan, failing to be so "*annexed*," in fact, sent by Commissioners to second President, to renew to the Trustees, the request of the first. pp. 248–249.

9. Annexation, by the second President, to the Plan compiled by Dermott, of the request of the first, with repetition of such request, to the Trustees. pp. 249–250.

10. Of the want of adequate information, in early days, upon this subject, by the law advisers of the government. p. 251.

11. This Plan, known, until otherwise christened below, as the Washington Map of 1797, the final and ultimate plan, *so far as it extended*, of the City. pp. 251-253.

12. Of the many differences between the Engraved Plan and Washington Map of 1797. pp. 253–254.

13. Of the inattention of this Plan to Water Street, along the Potomac. pp. 254–257

14. Of the prophetic observations thereon, in 1797, by N. King, surveyor. p. 258.

OF THE REFUSAL OF THE TRUSTEES TO CONVEY THE STREETS AND PUBLIC APPROPRIATIONS TO THE COMMISSIONERS.

1. Difficulty of applying the legislation of Maryland, to this subject. pp. 258–259.

2. Opinion, in 1799, of Attorney General Lee, that such conveyance was unnecessary. p. 259.

3. Continued anxieties, nevertheless, of the Commissioners, for its execution. p. 260.

OF THE PERFECTION OF THE PLAN OF WATER STREET, BY THE PRESIDENT, IN 1839, SUBJECT TO THE RIGHT OF WHARFING BY OWNERS OF LOTS ABUTTING ON THAT STREET.

1. Government title, in fee, *to soil* in streets, at *Washington*, deduced, by this Court, from specific language of supposed conveyance. pp. 260–261.

2. Of the inadvertence, in 4 Peters, 285, touching the terms of the conveyance made by the Trustees to the Commissioners, on November 30, 1796. p. 261, *n.*

PRESIDENT COMPETENT TO ACQUIRE WATER STREET, FOR UNITED STATES, QUA STREET, AND WITHOUT INCIDENTS OF RIPARIAN OWNERSHIP.

1. Not claimed, by present Brief, that Water Street, because acquired by government, *under that description*, deprived of riparian privileges. p. 262.

2. Commissioners, under Act Cong. July 16, 1790, empowered to "accept *such* land * * *as the President shall deem proper, for the use of the United States, and according to such plans as the President shall approve.*" p. 262.

3. Deed from Notley Young conveys his land to Beall and Gantt, in trust, to be laid out for a City "with *such* streets, squares * * * *as the President shall approve*," and, "all the *said* streets and such of the said squares * * * as the President shall deem proper for the use of the United States," are to be conveyed, in fee, by the Trustees to the Commissioners, for such use, forever. p. 262.

4. Proprietors, *hence*, committed to appropriation of their property, for streets, only as to "*such* streets" as President should approve. p. 262.

5. President, *hence*, made exclusive judge of *what land* should be accepted for use of Government—of number, character, and location of the streets,—of the uses, general or special, which land accepted for

streets, should subserve—and of the plan, or plans, of the City. pp. 262–263.

6. Commissioners, like heads of Departments, representatives of President. p. 263.

Concession, by Commissioners, of riparian privileges to lots on north side of Water Street, concession, in effect, of limited purpose for which land embraced in that street, was accepted by the President for use of United States. pp. 263–264.

President, in effect, accepted and approved Water Street, in front of land of Notley Young, as street only, unpossessed, as such, of riparian privileges. p. 264.

1. Of the *Plan No.* 2, *of William Elliott*, Surveyor, submitted to William A. Bradley, Mayor of the City, in 1835, "for *securing*" "water privileges," in the most equitable manner, amongst the owners of "property facing on Water Street, as well as *securing* the public rights." pp. 264–265.

2. In 1835, only authoritative plan of the City was Washington Map of 1797, *which, as to Water Street, along the land of Notley Young, had remained incomplete.*" p. 265.

3. Principle of the *Elliott Plan No.* 2. p. 265.

4. The Plan is described, on its face, as "Exhibiting the *water lots* and *Water Street* and the wharves and

docks *thereon*, along the Potomac, from E to T Street, south." p. 266.

5. Of the *wharfing site*, assigned by that Plan, to each square on the north side of Water Street, and of the sites for *docks*, and other like purposes, assigned to public appropriations, on the north side of Water Street, and to ends of streets there terminating. p. 266.

6. Of the Resolutions of the City Councils, of February 22, 1839, adopting *the Elliott Plan No.* 2, provided the approbation of the President be thereunto obtained. pp. 266–267.

7. These Resolutions approved by Peter Force, Mayor of the City. p. 267.

8. *Elliott Plan No.* 2, submitted by Mr. Woodbury, Secretary of Treasury, to—and, upon such submission, approved by—Commissioner of Public Buildings. p. 267.

9. Elliott Plan, No. 2, approved by President Van Buren. p. 267.

10. Attention of this Court, in 109 U. S. 697–698, directed to above Resolutions, merely as acts of *municipal legislation*, and not called to the effect of the approval, by the President, of Elliott Plan, No. 2, *as the ultimate adoption by the Executive of part of the plan of the city.* p. 268, *n.*

11. Importance of approval of this Plan by President, considered as an act of the Executive, finally *accepting land*, under the Act Cong. July 16, 1790, *for that*

use which he deemed proper for the United States, and according to the plan of which he approved, and declaring, conformably to the deeds of trust, his approval of *what should constitute Water Street*, and *for what functions he accepted it.* p. 268.

12. *Veto* power, over municipal legislation, vested by Congress, in *Mayor*, and the proviso, in Resolutions, for securing the approval by the President, of the *Elliott Plan No.* 2, deemed necessary, from the circumstance, that the President alone, could finally determine the plan of Water Street, and the uses for which that street should be accepted, on behalf of the government. pp. 269–270.

13. Of the remarkable professional career of the late Mr. Joseph H. Bradley, and of his long and intimate acquaintance and connection with the affairs, and with the people, of the City. p. 270, *n.*

14. Of the explanations made by Mr. Bradley when, as official counsel of the City, presenting the Elliott Plan to President Van Buren, for his signature. pp. 270–272.

Of the memorial, November 10, 1798, of original proprietors to the President, touching the incompleteness of the Plan of the City, with reference to Water Street, and, in consequence, to the rights of wharfing. pp. 272–273.

Of the advice given by the Attorney-General to the President, upon such memorial. p. 273.

Of the necessity, in the opinion of Attorney-General Lee, of obtaining the approval of the President to any plan of the City perfecting Water Street. p. 274.

OF THE PORTFOLIO AND OTHER MAPS OF NICHOLAS KING.

1. The Portfolio Map of 1803, *what*. p. 274.

2. Inaccuracy of Exhibit B, filed with the bill, when compared with sheet No. 2 of the Portfolio. pp. 274–275.

3. Exhibit U. S. No. 45, no "exact copy" of such sheet No. 2. p. 275.

4. Of the fluctuating and contradictory testimony of *Stewart*, concerning the authors of the Portfolio. p. 275, *n*.

5. Probable acquaintance of Nicholas King, prior to September 12, 1797, with the Washington Map of 1797. p. 276.

6. His familiarity with that map, prior to 1802, when he again became Surveyor. pp. 276–277.

7. Periods at which, prior to 1802, the *Kings* were surveyors. pp. 277–278.

8. Portfolio not directed nor approved by Commissioners, whose offices were abolished in 1802, and approved neither by Congress nor by the Executive. p. 278.

9. Copy of Portfolio made in 1834, by direction of Commissioner of Public Buildings. p. 278.

10. Use made, by succeeding Surveyors, of the talents displayed by Nicholas King, in the Portfolio. p. 278.

11. Nicholas King shown to be aware, that no work of his, could alter or create any plan of the City, unless au-

thorized by Congress, or by the President. pp. 278–279.

12. Though the cardinal object of the Portfolio was to define and promote the riparian privileges of individuals, confusion must result from recognizing the Portfolio as an authentic plan of the City. p. 279.

ANNEXATION OF RIPARIAN PRIVILEGES TO SQUARE 472, PRESUMED.

1. Of presumptions of grants from the Crown or State, as well as from individuals. pp. 279–280.

2. License granted by Commissioners, March 5, 1795, to Notley Young, original proprietor, to build wharf opposite this square. p. 282.

3. Wharf, as existing structure, appears opposite part of this square, on Washington Map of 1797. p. 282.

4. Analyses of alienations in this square, disclose its early division on Water Street, into 4 parcels, whereof one, since 1821, another, since 1823, and two, since 1838, had been actually conveyed with wharves, or moles, as existing structures. pp. 282–288.

5. From one of these wharves departed *Lafayette*, for Mount Vernon, in 1824. p. 289.

6. Of oral evidence upon the antiquity of wharves in front of this square. pp. 289–291.

Situation, with reference to Water Street, of square 472, situation of the squares, in general, carved from land of Notley Young lying on Potomac. p. 291.

Of the antiquity of other wharves particularly represented in the present brief. p. 292.

Of the local usage, at Washington, favorable to the right of the wharf-owner. p. 292.

The importance and propriety of respecting it. pp. 292–293.

1. *Common reputation, within the City.* pp. 293–294.

(*a.*) Of the testimony, on this subject, of Mr. Joseph H. Bradley. pp. 294–296.

(*b.*) *Hearsay*, upon questions of *public right.* pp. 296–300.

2. *Superior value attached to property on Water Street, and reason therefor.* pp. 300–301.

3. *Investments made on the faith of the annexation of the riparian privilege to lots on the north side of Water Street.* pp. 301–302.

4. *The constant claim and actual exercise of the riparian privilege by the owners of lots on the north side of Water Street.* pp. 302–305.

(*a.*) Shown from multiplied examples. p. 302.

(*b.*) Kennedy *v.* The Corporation, 3 Cr. C. C., 595–596. (an. 1829.)

(*c.*) Of Mr. *Walter Jones.* p. 304, n.

5. *Analysis of early conveyances in the* 18 *squares lying on Water Street, which were taken from the land of Notley Young. pp.* 305–316.

6. *Wharves opposite squares* 472 *and* 473 *taxed as improvements belonging to such squares. pp.* 316–317.

7. *City, in* 1846, *purchaser from individual, of lots on north side of Water Street, with water privileges and wharfing privileges, and, in* 1852, *vendor. pp.* 318–319.

8. *City, prior to* 1863, *neither claimed nor exercised riparian privileges, except opposite public reservations and at the end of streets. pp.* 319–323.

(*a.*) Examination of local enactments. pp. 321–322.

(*b.*) Such privileges ample, for every public necessity. p. 322.

(*c.*) Privileges, elsewhere, limited, in like manner. pp. 322–323.

Each of the departments into which the Constitution has divided the government of the United States became committed to the rights of the wharf-owner. pp. 323–335.

(a.) *The Wharfing Regulations of July* 20, 1795, *were approved by President Washington, and Plan No.* 2 *of William Elliott received the sanction of Mr. Van Buren.* p. 324.

(b.) *The United States became his tenant, and paid rent to the wharf owner.* pp. 324–325.

(c.) *The government became the proprietor of water property, by treaty with individuals.* p. 325.

(d.) *Reports from Commissioners, and their successors, to the President and to Congress, show sales of public water lots to individuals.* p. 325.

(e.) *Legislation of Congress such, that wharves from south side of Water Street, could not be continued, if illegal, without defiance of Congress, and grave official neglect.* pp. 325–326.

(f.) *Congress, between* 1829 *and* 1875, *created* 5 *Steamboat Companies, to navigate the Potomac, to and from Washington, under terms and circumstances demonstrating, that such Companies could reasonably accomplish the objects of their existence, only by*

becoming owners of lots on the north side of Water Street, between the Long Bridge and the Arsenal Grounds, and exercising the right of wharfage, opposite those lots, from the south side of that street. pp. 326–331.

Provisions of the charters of these several Companies. pp. 327–329.

To and from what riparian sites, at Washington, steamers of such companies, could physically engage in navigating the Potomac. pp. 329–331.

(g.) *The federal judges of this District upheld the claim of the warf-owner. p.* 3.

Of the decision, in 1838, of Ches. & O. Canal Co. v. Union Bank, 5 Cr. C. C. 509.—pp. 331–332.

Decision undisturbed for 42 years. p. 332.

Of the intimate acquaintance of Judge Cranch, who pronounced that decision, with the earliest transactions of the Commissioners. pp. 333–334.

Of the change in the attitude of the City, and of the void action of the Chief of Engineers of the Army, in respect to the riparian privileges on the Potomac. (pp. 234–235.)

The attitude of the City changed, in 1863, an era not favorable to calmness of judgment, and when marked al-

terations were taking place in our local population. pp. 235–236.

Subsequent enactments by the City, asserting power over the riparian privilege opposite private property. p. 336.

Inefficacy of *municipal legislation*, as against ancient and adverse possession protected by the Statute of Limitations. pp. 336–337.

As to the Communication from Commissioners Scott and White, on June 25, 1798, to Nicholas King. p. 337.

1. Commissioner *Thornton* not always in accord with his colleagues. p. 337, n.

2. N. King, at the date of this Communication, in the employ of original proprietors. p. 337.

3. Of the contents of this Communication. pp. 337–338.

4. Of some want of delicacy, in its terms, towards N. King, between whom and the Commissioners *friction* was increasing. p. 338, n.

5. Of correspondence between himself and the Commissioners Aug. 6/7, 1798. p. 339.

6. Of the Letter of N. King, of June 22, 1798, to which the Communication of the Commissioners, of June 25, 1798, was designed as a reply. p. 340.

7. Of observations in such Communication of the Commissioners, at variance with their former concessions. pp. 340–341.

8. Of what it was, N. King had proposed to the Commissioners. pp. 341–342.

9. Necessity of construing the Communication of the Commissioners of June 25, 1798, in connection with the particular proposal of N. King, and the situation of square 22, to which his proposal referred. p. 342.

10. "*High ground*" lying "*between Water Street and the water*," opposite that square. pp. 342–343.

11. This "*high ground*," if not thrown into the City, by inclusion in some square, *property, under his deed of trust, of the original proprietor*, who might not desire such ground omitted from the plan of the City. p. 343.

12. To the high ground adjoining the water, rather than to square 22 itself, the riparian privilege would naturally be considered as annexed. p. 343.

13. Conclusions of Commissioners, in their Communication of June 25, 1798, not to be understood as referring to land of Notley Young, in which land, as early as February 21, 1795, the Commissioners had recognized the right of Morris and Greenleaf, under the contract of December 24, 1793, to select the public water lots. p. 344.

14. Inconsistencies manifested by the Commissioners, in

their Communication of June 25, 1798, pointed out by N. King, in his letter of September 25, 1803, to President Jefferson. pp. 344–345.

INCONSISTENCIES OF INDIVIDUALS OPPOSING WHARF-OWNERS.

(a.) *Given.* p. 345.

The inconsistencies between his opinions and his conduct. pp. 345–346.

(b.) *William Gunton.* p. 346.

President of Bank buying wharf, in 1835, and acquiring, between that date and the fall of 1856, title to or lots in squares 300, 473, 503 and 504. p. 346.

Much of land specially represented by present brief, held under title derived from Gunton et als. p. 347.

Gunton, as early at least, as 1831, President of *the Washington, Alexandria and Georgetown Steam Packet Company*, so frequently in litigation before this Court, and, since, in this City, there was no other place from which it might conduct business, operating, it is assumed, from Water Street. p. 347.

(c.) *Peter Force.* p. 348.

1. Came from New York to Washington, after war of 1812. His pursuits here. p. 348.

2. As member from lower board of Joint Committee of Councils, in 1822, approves, and, in 1823, in conjunction with William A. Bradley, then member from upper board, of such Committee, causes publication of *Burch's Digest.* pp. 348–349.

3. Of the title page of that Digest. p. 349.

4. Of various matters contained in the "*Appendix*" to that volume. p. 349.

5. With what comment letter of September 25, 1803, from Nich. King to President Jefferson, introduced in such "*Appendix.*" p. 350.

6. Of the protest of *Force*, in the lower board of the City Councils, in 1835. pp. 350–351.

7. *Error* of Mr. Force, in 1835, in assuming that City had never admitted existence of "water rights" of individuals, between the Long Bridge and the Eastern Branch. p. 351.

8. Legislation of City examined, as to position last above. pp. 351–354.

9. Act Councils, March 19, 1823, established, as Fish docks, amongst other "sites," "the *Steam-boat wharf on the Potomac, near the bridge* over the Potomac," (probably the Lenox wharf opposite Square 270,) "and *at Cana's wharf*," opposite part Square 472. pp. 354–355.

10. Act contained in *Burch's Digest*, and *Force* member of lower board of City Councils, when act adopted. p. 354.

11. *Force*, mayor, with power of veto, approves, in 1839, plan of Elliott, which he had opposed in 1835. p. 355.

12. *Quare*, whether Force influenced by decision made at Dec. T. 1838, *in Ches. & O. Canal Co.* v. *The Union Bank of Georgetown?* pp. 355–357.

13. *Force*, as mayor, in 1840, grants license to *Easby* to erect one wharf and to extend another. p. 357.

14. *Force*, in part, prepares "*Halliday Report*," in 1846, exhibiting, in so doing, further variation of opinion. pp. 358–359.

(d.) *Halliday Report.*

1. *Halliday*, who had been foreman in the printing-office of Force, on May 25, 1846, from the Committee *of Police* of the lower board of the City Councils, presents report to that board, denying riparian privileges to lots abutting on Water Street. p. 358.

2. Certain positions assumed in the Report, as to lots taken from the land of *Notley Young*, examined, and found unsound. pp. 359–363.

3. Of observations made by Lord *Romilly*, in 1870. p. 363.

4. Exemption from error, upon legal questions, not to be expected in men not bred to the profession of jurisprudence. pp. 363–364.

(e.) *Van Riswick.*

1. Of the circumstances and the municipal legislation under which, on January 29, 1846, the City acquired certain lots, with the "*wharfing privileges*," in square 503. pp. 364–366.

2. Van Riswick, at the times of such legislation, as well as at the date of such acquisition, a member of the City Councils. p. 366.

3. Signer of the "*Halliday Report.*" p. 366.

4. Purchaser, nevertheless, in 1852, from the City of the lots with "wharfing privileges" by the City acquired in 1846. p. 367.

5. Of the conveyance by Van Riswick, in 1856, of certain of such lots, with "wharfing privileges." p. 368.

6. His acquisition, in 1852, from William Gunton et als., Trustees, of other lots in Square 503. p. 368.

7. Of the claims, as riparian proprietors, in the present controversy, of the children and heirs at law of Van Riswick. p. 368.

As to the Sea Wall on Water Street.

1. Municipal ordinances, in 1850, 1860 and 1866, making appropriations, for sea wall on Potomac, opposite

parts of what had been land of Notley Young, but not opposite any square specially represented in the present brief. p. 369.

2. Testimony examined, and conclusion drawn, that the persons who constructed the wharves were, in general, the constructors of sea-walls, in connection therewith, but, that, at any rate, this is so, as to the wharves specially represented in the present brief. pp. 369–372.

3. Joint Resolutions of the Councils of February 22, 1839, *require* wharves to be erected from sea-walls. pp. 372–373.

4. City never entered upon existing wharves, to erect sea-walls. p. 373.

5. Exercise of police power, to preserve street, for general comfort and convenience, no confiscation of private property. pp. 373–374.

6. If lot owner specially and peculiarly benefitted, by sea-wall, erected under public authority, assessments, consistent with due process of law, might have been made in the premises. p. 374.

Licenses by Chief Engineer of the Army, void.

1. Ten granted between January 18, 1868, and July 25, 1884. p. 374.

2. Subject mentioned to illustrate expedients employed to vex riparian proprietor. p. 375.

3. Of the nullity of such licenses, as viewed by the Supreme Court of the District of Columbia. p. 375.

4. Of the action brought by the City against the *Johnsons*, and by the late Dr. Thomas Miller against the City. p. 375, n.

EXCEPTIONAL POSITION, IN PRESENT CONTROVERSY OF WASHINGTON STEAMBOAT COMPANY, LIMITED.

1. Recapitulation of previous analyses of act Cong. August 5, 1886, and of the bill filed thereunder below. pp. 375–376.

2. Bill, as to wharf owners, substantially, *bill in equity, for discovery and relief*. p. 376.

3. The value of "any right, title or interest *adverse to the complete* and paramount right of the United States," to be ascertained by decree. p. 376.

4. Unusual language of this provision. p. 376.

5. Of what, in a suit in equity, brought by the government, may be deemed, in that forum, *a right, a title*, or *an interest* adverse to the *complete* and paramount *right* of the United States. pp. 376–377.

6. Not suggested, government *should be* estopped by acts and acquiescence of its agents, like individuals might be. p. 377.

7. *Contention*, that when legislative, executive and judicial departments have—when Congress alone has—long and consciously induced the citizen to acquire property, and otherwise alter his condition, upon the faith of their action, if government, in its suit in equity, for recovery of such property, be not estopped, or affected, then, is there exercisible *no true equitable jurisdiction in such a proceeding.* p. 377.

8. Constitution refers to "cases in law and *equity*," and the equitable remedies in the Federal Courts, are, in general, such as were known to the English chancery. p. 377.

9. Act Cong. July 1, 1864, incorporating *Potomac Ferry* Company, and acquisition, on June 1, 1881, of the property of that Company, by the *Washington Steamboat* Company, Limited, again brought to the attention of this Court. p. 378.

10. Constitutional power of Congress to dispose of territory and other property of the United States, limited only by extent of the government title. p. 378.

11. If no good private title existed to any property necessary to the ends for which the *Potomac Ferry* Company was chartered by Congress, then, the act Cong. July 1, 1864, authorizing that Company to purchase land and erect wharves thereon, (with power of alienation,) must be construed, in a court

of equity, *as a release of the rights of the United States*, in favor of such imperfect title to any land that that Company might acquire from individuals, for the necessary purposes of its creation. p. 378.

12. Situation, otherwise, too discreditable to be attributed to organized government, as shown from illustration of like situation, if arising wholly between individuals. pp. 378–379.

Supreme Court of the United States.

OCTOBER TERM, 1898.

UNITED STATES,
APPELLEES,
v.
MARTIN F. MORRIS, ET ALS.,
APPELLANTS.
No. 49.

On Appeal from the Supreme Court of the District of Columbia.

Brief for the Heirs of Moncure Robinson, Deceased, and Others, and for the Washington Steamboat Company, Limited. (*Claimants in Respect of Certain Lots in Squares* 472, 473, *and* 503, *respectively.*)

STATEMENT OF THE CASE.

The act of Congress of August 5, 1886, (24 Stat. 335; Rec. I, 13–14,) was passed for the purpose of establishing, by final decree, the title of the United States to all of "the land or water affected by the improvements of the Potomac river, or its flats, in charge of the Secretary of War."

The suit was to be "in the nature of a bill in equity," and all persons, natural or artificial, *known* to set up or assert, as well as all such as might, *in fact*, have, any claim or right in or to the land or water in question, were to be made parties to the proceeding.

Those who were within the jurisdiction were to be served with process, but publication was to be made, also, citing *all who were interested in the subject-matter* of the suit *to appear and answer the bill, and to "set forth and maintain" any* their rights or claims in the premises.

Unfounded pretensions were to be silenced or annulled, by suitable decree, but if there should be found to exist, in favor of a defendant, "any right, title, or interest adverse to the *complete* and paramount right of the United States," the court below was required, "in a summary way," "to proceed to ascertain the value of any such right, title, interest, or claim," exclusive of the value of any improvements made by the United States, and report was directed to be made to Congress, whose authority was made necessary for the payment of any judgment in the premises.

From the final decree of the court below an appeal was authorized to this Court, which, upon such appeal, might itself render a final decree.

The situation which called for this enactment was, in many respects, peculiar, and the particular remedy sought to be afforded by Congress was, in many respects, anomalous.

The bill below, filed November 26, 1886, (Rec. I, 1–13,) professed to be brought by the Government "*in its own right*," (a formula which may be supposed to derive explanation from the sense in which similar language is employed, in other connections, throughout the second paragraph of the bill,) and under the act of Congress already mentioned, which enactment was made an exhibit to the bill.

The only defendants actually named in the bill were Martin F. Morris, and others, as claimants to certain land in the Potomac, known as the "*Kidwell Meadows*," under patent from the United States; Henry M. Marshall, and others, who subsequently appeared as claimants to all the land and water of that river opposite the city, (Rec. I, 66, 336,) and the Chesapeake and Ohio Canal Company, together with certain individuals, the claims of whom, and of which Company, when asserted by answer, extended no further *east* than 17*th street west*. (Rec. I, 70; *Id.* plat next after p. 76; Rec. I, 100; III, 686; I, 93; III, 830; VI, 238; I, 88; V, fourth plat next after p. 120, the three plats following that plat, and the two plats following p. 124.)

The bill set forth, in terms, as well as through a certain exhibit, marked B* (Rec. I, plat opposite p. 14; V, plat opposite p. 4,) the boundaries of the land and water "*affected*" by such improvements of the Potomac and its flats as were in charge of the Secretary of War, these boundaries embracing the whole of the river and the sites of all of the wharves in front of the city.

Those claims which were based upon the *patent* from the United States, were the only claims, on the part of any of the defendants named in the bill, of which the Government professed competent information, and such claims as might be asserted in the controversy, on the part of other defendants, were left, by the bill, to be presented by answer.

To the Commissioner of the General Land Office, and to his principal clerk of surveys, the bill imputed very grave misconduct in connection with the grant of this patent; averred that the patent had been obtained by fraud, and insisted that it was a nullity.

* Though the bill attributes to this exhibit and the exhibit assumes, upon its face, a connection with *the plan of the city* which cannot be sustained, (Rec. I, 269–270; IV, 1410, 1515–1516,) the mistake is attended with no consequences of importance to this stage of the narrative.

And the bill prayed, in effect—besides process against the defendants therein named—that the patent might be cancelled; that, *in the manner provided in the enactment*, the court would proceed to determine the title to all the land and water within the boundaries described in the bill; that, *in the manner provided in the enactment*, all persons and corporations interested in the premises might be cited to appear and given notice of the suit, and, finally, *for general relief*. (Rec. I, 12–13.)

The bill, therefore, viewed in connection with the statute which it invokes, though unusual in its structure, was, in substance, as to those asserting riparian ownership on Water street below the Long Bridge, a *bill for discovery and relief*.

Before defining the relations to the controversy of such of the appellants as are represented in the present brief, it may be useful to glance at some particular events and transactions to which such relations become due.

These events and transactions will be found to arrange, in a single class, all those appellants, with the exception of the *Washington Steamboat* Company, Limited, whose situation differs, in some respects, from that of such class, and, to the extent of that difference, assigns to that Company a position of its own.

On February 25, 1834, there had been created by the State of Virginia a corporation, (of which Conway Robinson*

* This eminent author and "most careful and accurate as well as learned lawyer," (156 U. S. 167,) whose recollections, expressed in conversation, have been deemed worthy of mention in this Court, (*Id. Ib.*,) here first appeared as counsel, at February Term, 1839, (13 Pet. XI, 46, 47, 465, 473,) and ended his long and honored professional career with the cases reported in 109 U. S. 672.

was named as one of the corporators,) known as the *Richmond, Fredericksburg and Potomac Railroad Company*, for the purpose of operating a railroad between Richmond and Fredericksburg, with power to the Company to extend its lines to the Potomac, or to some creek thereof.

Acts Va. Assembly 1833–1834, pp. 127–128.

And it was recited in the act that the road would "*form a part of the main northern and southern route* between the city of Richmond and the city of Washington."

The Richmond, &c., Railroad Company *v.* The Louisa Railroad Co., 13 How. 80.

Of this enterprise, Moncure Robinson, of Philadelphia, (brother of Conway Robinson,) had been principal promoter.

As early as 1825, and before the creation of the Richmond, Fredericksburg and Potomac Railroad Company, William A. Bradley had erected a wharf opposite square 356, from which, for many years, the Washington and Fredericksburg Steamboat Company was engaged in the transportation of passengers and public mails to Potomac creek or Acquia creek, whence, by land, they were transported to Fredericksburg.

Rec. IV, 1425, 1433, 1454, 1455, 1459, 2101.

Bradley *v.* The W., A. & G. S. P. Co., 13 Pet. 89, 91, 95–96.

Subsequently, there had existed, on the river side of Water street, and where that street would be intersected by the prolongation of O street south and 6th street west, a wharf known, from the uses to which it was devoted, as that of the Richmond, Fredericksburg and Potomac Rail-

road Company. (Rec. IV, 1817–1818, 1823–1824, 1827, 1831–1832.)

This wharf was situate opposite lot 11, in square 503. (Exhibit M. R., No. 4, Rec. I, third plat after p. 324.)

To *Pumphrey*, who had resided near the Potomac for seventy-three years, (Rec. IV, 1814,) and whose testimony was delivered on June 25, 1891, (*Id.* 1821,) it had been known, perhaps, for 45 years, (*Id.* 1817–1818,) and it was an old wharf in the earliest recollection of *Boss*, (Rec. IV, 1832,) who testified on the same day, (Rec. IV, 1837,) and who had had knowledge of the shore line since 1836. (*Id.* 1829.)

From this wharf one steamer had run to Acquia Creek. Another had plied to and from Pope's Creek, and thence fourteen miles to and from Fredericksburg, and formed, thus, part of the regular route to Richmond.

Of the *Potomac Steamboat* Company, (which must be confounded neither with the *Potomac Ferry* Company nor with the *Washington Steamboat* Company, Limited, both to be hereafter mentioned,) *Moncure Robinson*, of Philadelphia, and others of that city were principal stockholders and substantial owners. (Rec. IV, 1728–1729, 1840, 1860.)

The *Potomac Steamboat* Company had acquired, on May 29, 1856, lot 11, in square 503, in this city, (Rec. IV, 1406,) opposite which lot was the wharf already mentioned and then still known as that of the Richmond, Fredericksburg and Potomac Railroad Company; on July 17, 1856, original lots 1 and 2, in square 473, (Rec. IV, 1403,) according to the first subdivision of that square, (*Id.* 1377,) and, under deeds of October 1, 1860, (Rec. IV, 1368–1369,) and Sep-

tember 19, 1861, (*Id.* 1364,) respectively, one undivided moiety of and in square 472, with its wharves, privileges, and the like, the other undivided moiety being held by George Parker and Thomas Parker, in equal interest.*

All of the property thus acquired by the *Potomac Steamboat* Company, was so acquired for the purpose of securing connection, by steamers to and from Washington *via* Acquia Creek, or Quantico, with the Richmond, Fredericksburg and Potomac Railroad, (Rec. IV, 1729,) and in absolute good faith and belief that with the property thus acquired, was acquired also the right of wharfage opposite thereto. (Rec. IV, 1862, *id.* 1467, 1468, 1492.)

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*This Company had also acquired, on July 10, 1856, certain other lots, with wharfage privileges, in square 503, (Rec. IV, 1407,) and though rights were asserted in respect of such privileges, in the answer filed below by Moncure Robinson and others, all claiming under that Company, (Rec. I, 275,) the subsequent alienation of the lots in connection with which such privileges were asserted, (Rec. VII, 2391,) terminated, of course, this particular contention of the answer.

The same Company had purchased, moreover, on May 30, 1856, lot 13, in square 504. (Rec. IV, 1372.)

But the Inland and Seaboard Coasting Company, having first endeavored, without effect, to purchase that lot from the Potomac Steamboat Company, for the *specific purpose* of securing, through such purchase, a right to the privilege of wharfing in front of the lot, (Rec. IV, 1471,) obtained, on June 26, 1875, from the Chief of Engineers of the Army, a license revocable in terms, but wholly void in law, to appropriate, for wharfing purposes, the site in the Potomac, opposite that lot, for the term of 20 years, but with proviso that, at the expiration of such term, all wharves, buildings, and improvements erected by the licensee upon such site should become the property of the United States. (Rec. I, 126–127.)

The Potomac Steamboat Company resisted this appropriation, but was adjudged by this Court, at October Term, 1883, to be without title in the premises, (109 U. S. 672,) and the Inland and Seaboard Coasting Company claimed under that license, against the Government, in the present controversy (Rec. I, 124;) was defeated, (Rec. VII, 2544–2545, 2549,) and has not appealed.

The real estate, wharves, and the like, of the *Potomac Steamboat* Company, upon sale thereof under deed of trust, were purchased by, and, on September 23, 1885, (Rec. IV, 1407,) conveyed unto, *Moncure Robinson*, *Charles Chauncey*, *A. Sydney Biddle*, *Sarah C. Savage*, and others, the purchasers and grantees, (all of Philadelphia,) being the principal stockholders of the Company and the persons chiefly secured by the trust. (Rec. IV, 1860, 1863).*

The one-fourth interest which had been acquired by George Parker, and the like interest which had been acquired by Thomas Parker, in square 472 itself, had passed, on January 11, 1886, to one Benjamin H. Warder, (Rec. IV, 1400,) who, on January 10, 1887, and out of abundant caution, quit-claimed to Thomas Parker, as to the interest of the latter *in the wharf*, &c. (Rec. IV, 1401.)

The one-fourth interest which had been held by George Parker in the *wharf, &c.*, opposite square 472, had passed, on January 11, 1886, to Moncure Robinson. (Rec. IV, 1400.)

Thus, then, Moncure Robinson and his co-purchasers at the trust sale were owners of one-half of square 472 and of three-fourths of the wharf, &c, opposite thereto.

Benjamin H. Warder was owner of one-half of that square, and Thomas Parker owner of one-fourth of the *wharf, &c.*, opposite thereto.†

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* This conveyance was, indeed, made after the decision of this Court reported in 109 U. S. 672.

But it is scarcely necessary to say, that, if the Potomac Steamboat Company was a purchaser without notice, no notice on the part of those claiming under that Company, can be suffered to prejudice their title.

Mills v. Smith, 8 Wall. 27.

† On February 11, 1888, by deed of partition, the eastern half of the square passed to Warder, and the western half, bounded by Water street, with release from Warder of all wharfing rights and all riparian

There had been created by act of Congress July 1, 1864, (13 Stat. 331,) a corporation to be known as the *Potomac Ferry* Company, and which, by section 3 of that act, was "authorized and empowered to establish and run a line, or lines, of vessels, propelled by steam or other power, between the cities of Alexandria and Washington, and (*sic*) other ports in the State of Virginia, on the Potomac River, Chesapeake Bay, or the tributaries of the same."

Section 4 enacts—

"That the said Company is also authorized to *purchase*, *hold*, and *grant* such *real estate* as may be *necessary* to carry into effect the purposes of this act, and to *build* all necessary docks, wharves, and buildings *thereon*, for their own use; may transport passengers and freight of every description, subject to the rules and regulations and laws of the United States; * * * and, generally, may have and possess the rights and privileges usually possessed by similar corporations."

Under this enactment, the *Potomac Ferry* Company acquired, by purchase, on September 9, 1864, original lot 6, in square 473, (Rec. IV, 1404,) according to the first subdivision of that square, (*id.* 1377,) and, on April 6, 1866, original lots 4 and 5 in that square, (*id.* 1403,) according to that subdivision, and, on November 18, 1867, it created, from these three original lots, 17 sub-lots, of which sub-lot 1 was made to embrace the whole of the frontage upon Water street that had been embraced by the three original lots. (Rec. IV, 1404).

Opposite the land which it had thus acquired, the *Potomac Ferry* Company erected certain wharves and other im-

privileges, unto Moncure Robinson and his associates. (See the deed and plat of division, Rec. IV, 1408-1409.)

On February 25, 1893, the one-fourth interest that had been held by Thomas Parker *in the wharf, &c.*, was conveyed to Charles C. Savage. (Rec. VII, 2392.)

provements, and employed them in the prosecution and for the convenience of its business, (Rec. I, 327; IV, 1846, 1853, 1858–1859,) until June 1, 1881, when it conveyed such sub-lot 1, together with those wharves and improvements, unto the *Washington Steamboat* Company, Limited, (Rec. IV, 1405,) a further assurance, embracing all of the 17 sub-lots, being made by the former Company to the latter, on May 4, 1883. (Rec. IV, 1405.)

The *Potomac Ferry* Company, from the time of the erection of such wharves, until June 1, 1881, was engaged, and the *Washington Steamboat* Company, Limited, has since been employed, in the transportation, by steamers, of passengers and freight to and from those wharves, between Washington and Alexandria, the line, in each case, while thus operated, furnishing the only regular means of communicating, with frequency, by water, between the two cities. (Rec. I, 327; IV, 1852.)*

On January 24, 1887, Moncure Robinson, his associates, and Thomas Parker, answered the bill. (Rec. 1, 260.)

The extent and nature of the rights asserted by the respondents, many of the circumstances in which those rights were supposed to have originated, some, through which they were conceived to be illustrated and confirmed, the antiquity and good faith of the open, continuous, exclusive and adverse possession of the respondents, or of those under whom they claimed, and the large expenditures by them made upon and in connection with the property, were, with various other particulars, set forth at large in the answer.

* From the circumstance that the *Washington Steamboat* Company, Limited, succeeded to the title and to the pursuits of the *Potomac Ferry* Company, the former is often mentioned as "the Ferry Company," "the Potomac Ferry Company," or "The Alexandria Ferry Company." (Rec. IV, 1852, 1858, 1866.)

Amongst the exhibits filed with this answer, one there was, prepared by the surveyor of the District, (Rec. IV, 1860,) and marked M. R. No. 4, (Rec. I, third plat after p. 324,) which, in connection with the explanations contained in those paragraphs of the answer numbered from 13 to 19, both inclusive, (Rec. I, 272–277,) sufficiently located all of the structures as well as the whole of the wharfage site claimed by the *Robinson interest.*

The wharves which, upon that exhibit, appear opposite lots 1 and 2, in square 473, and lot 11 in square 503, (the wharf opposite such last-mentioned lot being, as shown on that exhibit, the old wharf of the Richmond, Fredericksburg and Potomac Railroad Company,) are now in use, under leases from the appellants represented in the present brief, by various steamers engaged in navigation on the Potomac. (Rec. IV, 1873.)

The wharf observed upon that exhibit, opposite a portion of square 472, and marked "*Potomac Steamboat Company Wharf*," with its dock, shed, yard, and the like, are in the daily service, under like lease, of the *Norfolk and Washington* Steamboat Company, (Rec. IV, 1873,) a line operating between the cities from which it receives its name.

Opposite part of the same square may be seen, on that exhibit, the "*coal yard*," and portions of the "*wharf*" and "*office*" of the "*Steamer Corcoran*," and also a portion of the "*dock*" lying between such coal yard and wharf, and used by that steamer.

These works were accomplished by a certain corporation *created*, for purposes of vexation, to be known as the Upper *Potomac Steamboat Company*, under color, partly, of a license granted by the Commissioners of this District, on October 15, 1874, and recognizing, in effect, that square 472 was a "water lot," (Rec. VI, 139,) and, partly, of a

license, revocable in terms, but void in law, obtained by that Company from the Chief of Engineers of the Army on March 13, 1875, to erect a wharf on the west side of Water street, "so as not to interfere with an existing wharf," and to construct buildings, and other necessary improvements, in connection with the wharf so authorized to be erected. (Rec. IV, 1391–1392.)

The *Potomac Steamboat* Company resisted these constructions, but was adjudged by this Court to be without title so to do. (109 U. S., 672.)

The sites occupied by these works (unclaimed in this cause by those in possession,) are not embraced, therefore, in the claim asserted by the answer of the *Robinson interest.* (Rec. I, 272–275, and the third map after p. 324; Rec. IV, 1860–1861.)

On January 24, 1887, the *Washington Steamboat* Company, Limited, also answered the bill, (Rec. I, 325,) adopting, for convenience, and as far as applicable, the answer already mentioned as filed on that day, but relying, also, upon the title it had derived from the *Potomac Ferry* Company, under the acquisitions made by this latter Company, in pursuance of the authority conferred by the act of Congress creating it.

With the answer of the *Washington Steamboat* Company, Limited, was filed a certain exhibit, prepared by the surveyor of the District, and marked W. S. C. L., (Rec. I, plat next after p. 330,) which, in connection with the explanations contained in that answer, (Rec. I, 326–329,) sufficiently designated and located all of the structures, as well as the whole of the wharfage site, claimed by that Company in the present controversy.

But it was complained, in effect, in the answer of that

Company, (Rec. I, 329,) and established by evidence, (Rec. IV, 1853, 1854, 1855,) that, under color of a certain void license by him obtained, on February 11, 1881, from the Chief of Engineers of the Army, but not recorded until July 13, 1881, (Rec. IV, 1415,) one *George L. Sheriff** had unlawfully erected a certain wharf, 40 feet in width, and also a certain office, upon the site of the riparian privilege belonging to that Company and situate opposite that portion of its property which was formerly original lot 4, in square 473, the location of these erections being explained in the answer (Rec. I, 329) in connection with the exhibit so filed and marked W. S. C. L. (Rec. I, plat next after p. 330.)

For what was alleged, without proof, to have been done under this license, which, though running for 20 years, was, upon its face, sooner revocable, at the pleasure of the authority which granted it, (Rec. I, 131–132; IV, 1415–1417,) *Sheriff* interposed his claim against the Government in the present cause, (Rec. I, 129;) was defeated, (Rec. VII, 2544–2545, 2549, and has not appealed.

With a view to convenience, and in advance of the hearing, it was stipulated that a decree *pro forma*, (9 How. 391,) might be rendered against the appellants represented in this brief, (Rec. VII, 2396,) and though this stipulation seems not to have been accepted by the court, those appellants contributed nothing to the very able presentation made by counsel, and mentioned in the opinion below. (Rec. VII, 2542.)

* This character seems to have been the chief pirate on Water street. See his extensive seizure, without pretext of authority, private or public, opposite parts of square 503 and N Street south. (Rec. I, 275; *id.*, third plat after p. 324; Rec. IV, 1868.)

By death and the consolidation of titles (Rec. IV, 1408; VII, 2391–2393, 2547) in the course of the litigation, the interests and titles of Moncure Robinson and his associates became vested in Charles C. Savage, of Philadelphia, and the heirs at law, partly of Moncure Robinson and partly of his son, John M. Robinson, (subject to dower by the widow of such son,) and to these alterations in title, the record, under stipulation, (Rec. IV, 1409; VII, 2548,) was made to conform, the appellants represented in the present brief constituting the new parties in the premises.

By act Congress, January 7, 1895, (28 Stat. 599,) this cause was to remain in, and be determined by, the Supreme Court of the District of Columbia, with the right of appeal directly to *this* Court, notwithstanding the act Congress of February 28, 1893, (27 Stat. 434,) creating a court of appeals for that District.

By article second of the final decree, passed by the Supreme Court of the District of Columbia on October 17, 1895, the claims asserted by the present appellants (and by others) were "declared to be *invalid, void, and of none effect*," and the third article adjudged, in substance, the non-existence of "any right, *title, or interest*," in those appellants, (and others,) within the limits described in the bill, "*adverse to the complete and paramount rights of the United States*," and declared absolute in the United States the right and title to all land and water embraced within such limits. (Rec. VII, 2549.)

So much of the case as is represented in the present brief, is here upon appeals from each of these articles of that decree, (Rec. VII, 2553,) the value of the claims asserted by the appellants in this brief, having been so

ascertained, by stipulation, (Rec. VII, 2393–2394,) as to obviate any question of jurisdiction, if, from the purposes and terms of the act under which the suit was instituted, the right of appeal might eventually be supposed to *depend upon value.*

ASSIGNMENTS OF ERROR.

The court below erred—

1. In decreeing, in substance, the claims asserted below, by the appellants upon the present brief, to be invalid, void and of none effect.

2. In decreeing, in substance, that there existed no right, title, or interest in such appellants, within the limits described in the bill, adverse to the complete and paramount rights of the United States.

3. In decreeing, in substance, that the right and title to the land and water, claimed below by such appellants, within the said limits, were absolute in the United States.

ARGUMENT.

It will be the contentions of the appellants represented by the present brief—

I. That those appellants have a valid legal title to the wharves and riparian privileges opposite the property they claim.

II. That though they may have no such title, they yet possess rights and interests in such wharves and privileges which, in a court of equity, must be deemed adverse to a *complete and paramount* title in the Government, within the meaning of the act Congress of August 5, 1886.

Before entering upon these contentions, it may be convenient to notice certain *accidents* of the controversy, which may be deemed to operate, in some degree, unfavorably upon the position of the wharf owner.

It is inevitable, perhaps, that the claims represented in the present brief should suffer some disadvantage from their association, in a single proceeding, with pretentions, some of which have been arraigned, as to their origin, under grave imputations by the Government, and some of which, though of much antiquity and most extensive in character, are now, for the first time, sought to be established.

To this disadvantage, it ought not be attempted to add the suggestion of any conflict between the rights advocated by the wharf owner, and so important a public measure as that of improving health and navigation at the Capital of the country.

'*The wharves erected into the Potomac, between the Long Bridge and the Arsenal grounds, though their existence may diminish public revenue, if the sites which they occupy belong, in law, to the United States, neither "affect," nor are "affected" by, any public improvement made, or now contemplated to be conducted, in the Potomac.*

It is unnecessary to largely discuss whether the wharfing sites opposite the squares particularly represented in the present brief, can be justly described, as alleged by the bill, (Rec. I, 3) but expressly denied by the answer of the *Robison* interest, (Rec. I, 260, 261,) adopted by the *Washington Steamboat* Company, Limited, (Rec. I, 325,) as "*affected*" within the meaning of Sec. 1, of act Congress, August 5, 1886, (24 Stat. 335, Rec. I, 13,) by the improvements contemplated in that act, and mentioned in the bill.

Things are not to be considered as "*affecting*" either persons or each other, in any correct legal sense, merely from the circumstance that they may exert some influence, however incidental, either upon persons or each other.

United States *v.* Ortega, 11 Wheat. 467.

Blyew *v.* United States, 13 Wall. 591.

It might not be difficult to deduce from the Record, (V, 2, 3, 4, 5, 18, 19; II, 37, 38, 39, 47, 48, 440–441; I, 288–324,) in connection with the acts of Congress of March 3, 1881, (21 Stat. 470, 484,) August 2, 1882, (22 *id.* 198,) and July 5, 1894, (23 Stat. 138,) a consistent intention, both on the part of the engineer officers and of the legislature, to deal with the subject of wharfing and wharfing sites on the Potomac, between the Long Bridge and the Arsenal grounds, no further than those subjects might be incidentally "affected" *by the establishment of harbor lines* between those extremities.

The report made on January 17, 1882, by Engineer Abert, (Rec. I, 289,) under sections 3 and 4 of act Congress March 3, 1881, (21 Stat. 484,) and transmitted, on March 8, 1882, to the Senate by the Secretary of War, (Rec. I, 288; Rec. V, 18, 19,) discloses, amongst other things, through an accompanying map, though with less precision than was contemplated in maps to be made after fuller sur-

veys, "the outer port warden line beyond which neither wharves nor landing slips will extend," (Rec. I, 293,) and observes—

"For the Washington channel, the *inner line follows nearly the limits of existing wharves*, and the outer line of the Washington harbor is 800 feet from the inner line. The inner line, beyond which it is recommended that no wharves be allowed to extend, is as follows," &c. (Rec. I, 294),*

By referring to the map accompanying the report of Mr. Abert, (Rec. I, map immediately after p. 296,) it will be perceived, at once, that the *inner* of the harbor lines, between 15th street west and the Arsenal, falls, *in all instances, southwest of the wharves erected between those points.*

Nothing has been accomplished by the arbitrary removal of the inner harbor line *to the northeast of those wharves*, locating that line upon *dry land* (Rec. I, map immediately after p. 14; Rec. V, map immediately after p. 4) and averring that the sites of wharfage, thus *rendered* exterior to that line, are "*affected*," within the meaning of the Act of Congress of August 5, 1886, by the improvements mentioned in that act and in the bill.

The improvements undertaken in the *Washington* channel of the Potomac have long since been completed, and have left the wharves precisely as they were intended to be left by Mr. Abert, and as they appear, in point of fact, upon Exhibit B to the bill. (Rec. I, plat immediately after p. 14; Rec V, plat immediately after p. 4.)

*The Act of Congress of August 2, 1882, (22 Stat. 198,) erroneously refers to Engineer *reports made in compliance with a Senate resolution* of December 13, 1881, the resolution adopted, on that date, by the Senate, relating to the *appointment of a committee* to inquire and report touching the Potomac front, &c. (Rec. V, 14-15.)

The " Potomac Flats," together with the tidal reservoirs, are now, in law, by act Congress March 3, 1897, (26 Stat. 624,) the " Potomac Park."

No interruption of the exercise of wharfing has been contemplated by Congress from the improvements made under their authority in the Potomac at Washington.

By acts Congress March 3, 1887, (24 Stat. 574,) and July 18, 1888, (25 *id.* 316,) moneys received by the Collector, for leases of streets and reservations and for wharf charges, are to be by him paid into the National Treasury to the equal credit of the United States and of the District.

And by act Congress May 19, 1896, (29 Stat. 126–127,) deposits in the Potomac, or on its shore below high-water mark, are prohibited, except for the purpose of erecting wharves, after permission thereunto obtained from the Commissioners, and the wharves must be enclosed and so secured as to prevent injury to navigation.

The claims, then, asserted by the owners of wharves situate on the north side of Water street, between the Long Bridge and the Arsenal grounds, though such claims, since they are attended by occupation, may diminish the revenue derivable by the Government and the District from leases of the wharfing privilege, bear only a general, remote and incidental relation to any work of improvement already completed in the river, and only the same relation to any there in progress or there now contemplated.

And, *within the meaning of the act of Congress* of August 5, 1886, the wharfing privileges at Washington are as little "*affected*" by the improvements authorized in the Potomac,

as they might be "*affected*" by improvements conducted in the Pasig, at Manila, or in the Rio Canto, in Cuba.

It is not to be denied that, upon the record which came before this Court at October Term, 1883, (109 U. S. 672,) it was determined that Water street, where laid out upon land which had belonged to Notley Young, as original proprietor, was vested in fee-simple in the Government, and that the riparian privilege was annexed to such street and in nowise connected with the lots abutting on the north side thereof.

The ownership, in fee, by the United States, in Water street, was not questioned by the appellants in that controversy.

Nor did they dispute that the privilege of wharfing, being naturally connected with that street, ought to be viewed as associated with private property, between which and the river that street intervened, only upon the most satisfactory considerations.

The position there sought to be maintained by those appellants was, in effect, that by transactions and the course of dealing between the original proprietors, purchasers, and the Government, from the exigencies and necessities of a difficult and unprecedented situation, the wharfing privilege, from the foundation of the city, had been, in fact, rendered private, though title in fee to the street might be deemed in the public.

But the case which came before this Court in 109 U. S. 672, presented but a very limited and imperfect view of the field that is embraced on the present appeals.

The record in those cases contained but 512 pages, and had been prepared, it may be presumed, with particular reference to the squares situate on that portion of Water street which had been carved from the land of Notley Young.

The seven volumes now before the Court deal with the river front from a point near Rock Creek to the lower extremity of the Arsenal grounds, and thence round the Eastern Branch.

Rec. I, Ex. B, plat next after p. 14; Rec. V, plat next after p. 4.

Much of the information contained in those volumes, though highly material and instructive upon the contentions advanced in 109 U. S. 672, found no place in the record of those cases, and is now, it is believed, brought for the first time to the light of modern days.

The range of comparison and inquiry involved on the present appeals is, therefore, much more extensive than that which the contents of the record in the former cases would there suffer to arise.

The brief before the Court raises certain questions of law, of which some, though presented on the argument of the former cases, became unnecessary for the determination thereof, and were neither actually nor inferentially decided; others which, though since felt by counsel to have been of much importance to those controversies, were not therein brought to the attention of the Court; and still others which, either from the distinctive nature of the title of some of the present appellants, or from the particular terms of the statute under which the bill below was filed, are in this Court, yet to be considered.

It cannot, therefore, be fairly assumed that the cases made and presented by the present appellants are, in substance, only the cases made and presented in 109 U. S. 672.

The former decision, too, though none the less in consequence the decision of the *Court*, expressed, nevertheless, the convictions of but five, Mr. Justice Harlan, inclusive, of the nine judges composing the Court, Mr. Justice Bradley

being absent, and Mr. Chief Justice Waite, together with Mr. Justice Miller and Mr. Justice Gray, dissenting.

Were it otherwise, the Government, upon the faith of the decision pronounced in the former cases, has neither bought nor sold, neither expended nor improved, neither altered nor compromised its condition in the smallest particular.

Louisville R.R. Co. *v.* Letson, 2 How. 556.
Propeller *Genessee Chief*, 12 *id.* 458.

This Court may certainly, therefore, if so minded, indulge its own judgment upon the subject before it, "yielding to decided cases everything that can be claimed for them on the score of authority except the surrender of conscience."

Louisville R.R. Co. *v.* Letson, 2 How. 555.

The laws of every country are but the expressions of its needs, its exigencies and its polity.

From the Norman Conquest to the time, at least, of James II, the history of British land law is but the constant adaptation of that law to the varying conditions of British history—to social, economical, and constitutional development.

If the exfoliation of the law of real property has been, in England, but the chronicle of *tenure* fashioned to new and altered circumstances, that branch of the law has been moulded, in America, to similar conditions, in a manner much more immediate and conspicuous.

From titles in Louisiana, Florida and Missouri, from those derived from the Indian tribes, from the land system of the Pacific coast, in pre-emptions and sales of the public

domain, in swamp-land grants and in grants to railroads, in the law of mines and of mining, and in emblements of timber and of grass, from Government property—all governed by their own principles—we may read the history of a continent, from the first struggles of immigration for existence, through the necessitous but hardy enterprise of succeeding generations, down to the present state of American opulence and supremacy.

The history of the title to the riparian privilege on the Potomac, opposite those lots on the north side of Water street which were carved from the land of Notley Young, is the history of the hostilities attending the selection and the uncertainties surrounding the permanence of the present seat of Government, of its entire want of resources and its helpless dependence upon the sale of public lots, aided by loans from Maryland and Virginia, of the liberality prevailing in 1790 in those States and in others on the Atlantic, in respect to private appropriations of the riparian privilege, and of the obvious necessity of extending express and important inducements to individuals to become purchasers at the new but uncertain city, and to there erect abodes for population and accommodations for traffic and intercourse by water.

A larger view of the situation than any that can be derived from the technical operation, at common law, of particular terms to be found in informal papers, becomes, therefore, indispensable.

Not that it will become possible to avoid some consideration of common law principles, or to omit the investigation of very numerous relations of fact, but that the results of these minuter inquiries may be found (as is hoped) to be such only as arise from the subject when exposed to general and comprehensive view.

By *Act of Maryland* of December 23, 1788, ch. 46, (2 Kilty,) her representatives in Congress were authorized and required to cede to Congress any district in that State, not exceeding ten miles square, which might be fixed upon and accepted by the Legislature of the Union for the seat of Government. (Burch Dig. 213, Davis' Laws, 59.)

A similar district, for the like purpose, was ceded by *Virginia*, by act of December 3, 1789. (*Id.*, *ib.*, 13 Hen. Stat. 43.)

By *Act of Congress* of July 16, 1790, the seat of Government being then at New York, the President was authorized to appoint three *Commissioners* to survey, and, by proper metes and bounds, to define and limit, under his direction, a district of territory, to be located on the river Potomac, at some place *between the mouths of the Eastern Branch and Connogochegue*,* for the permanent seat of Government, and the district which should thus be located was, by that act, accepted as such permanent seat of Government.

1 Stat. 130; Burch Dig. 225–226; Davis' Laws, 115.

By the same act of Congress the Commissioners were empowered "to purchase or accept such quantity of land on the eastern side of the said river, within the said district," as the President might deem proper for the use of the United States, and *according to such plans as he might approve*, and were required, prior to the first Monday of December, 1800, to provide suitable buildings for the accommodation of Congress and of the President and for the public offices

* This stream, (spelled in divers manners,) emptied into the Potomac at *Williamsport, Md.* (2 Scharf's Md. 350, 567, and note.) This work—unnecessarily, it would seem—was offered in evidence by the Government. (Rec. VII, 2124.)

of the Government; "*for defraying the expense of such purchases and buildings*" the President "was *authorized and requested to accept grants of money;*" "prior to" the first Monday of December, 1790, all offices attached to the seat of Government were to be removed from New York to Philadelphia, where the next session of Congress was to be held, and where those offices were to remain "until" (*sic*) the first Monday of December, 1800,* when they and the seat of Government were to be removed to the district selected under the act; the necessary expense of such removal was to "be defrayed out of the duties on imposts and tonnage, of which a sufficient sum" was, by the act, "appropriated," but, by a proviso in the 1st section of the act, the operation of the laws of the State, within the selected district, was not to be deemed affected by the acceptance of the district, until the time fixed for the removol of the Government thereto and until Congress should otherwise provide by law.

1 Stat. 130; Burch Dig. 225; Davis' Laws, D. C., 115.

On January 22, 1791, Thomas Johnson† and Daniel Car-

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*By act Congress, April 24, 1800, Sec. 1, (2 Stat. 55,) the President was empowered to direct the removal to Washington of the executive departments at any time he might deem proper after the expiration of the session at which the enactment had been passed.

By act Congress, May 13, 1800, (2 Stat. 85,) it was provided that Congress should meet at Washington on the third Monday, which was the 17th day, (2 Bent. Abr. 428, 480,) of November, 1800, and the two Houses, adjourning on May 14, 1800, at Philadelphia, met at the appointed date in Washington, where five months before the executives offices had been opened. (Davis' Laws, 51.)

†The life-long friend of Washington, whom he had nominated as Commander-in-Chief of the Continental forces. First Governor of Maryland after the Declaration of Independence, and appointed August 5, 1791, and confirmed November 7, 1791, associate justice of this Court, resigning therefrom early in 1793. (2 Scharf's Md. 180, 286, 574; 2 Dall, 402.) His elevation to the bench did not induce him to retire as Commissioner.

roll,* both of Maryland, and David Stuart,† of Virginia, were appointed such Commissioners. (Rec. VI, 157; VII, 2164.)

The boundaries of the district to be located and defined by these Commissioners, included Alexandria, and were declared, in part, by the proclamation of the President of January 24, 1791. (Rec. VII, 2165–2166; 11 Stat. 751; Burch Dig. 214–216; Davis' Laws, 56–58; 12 Spark's Writ. 123.)

The act of 1790 having required the Potomac boundary of the Federal district, within the cession from Maryland, to extend no further, in an easterly direction, than to the *mouth of the Eastern Branch*, the President was most explicit in adhering to that boundary, in his proclamation of January 24, 1791, but, nevertheless, on that day, suggested to Congress, by message, (12 Spark's Writ. 89–90; Rec. VII, 2167,) their reconsideration of this restriction, and the same having been repealed by act of Congress of March 3, 1791, (1 Stat. 214; Burch Dig. 226–227; Davis' Laws, 116,) and the President, by that act, empowered to locate the district "so as to include a convenient part of the Eastern Branch," "and, also, the town of Alexandria," (2 Scharf's Md. 567–568,) the Executive, on March 30, 1791, issued from George-

He continued such until the summer of 1794, (Rec. VII, 164–165,) and was offered, but declined, the office of Secretary of State, upon the resignation of Randolph in 1795. (11 Spark's Writ. 59-60.)

* Cousin of Charles, of Carollton. Resident within the cession. Member of the Continental Congress and of the Convention which framed the Constitution and of the 1st Congress under the Constitution, in which he had advocated and voted for the Potomac. (1 Bent. Abr. 159, 160, 249; 2 Scharf's Md. 540, 573*n*).

† Styled by Irving, "Washington's monitory friend." The confidence and affection existing between Washington and Dr. Stuart may be seen from their correspondence. Oct. 17, 1787. (9 Spark's Writ. 271). July 26, 1789, March 28, 1790, June 15, 1790. (10 Spark's Writ. 17, 82, 94).

town his further proclamation in conformity with such additional authority.*

Burch Dig. 216–217; Davis' Laws, 58–59; Rec. VII, 2173–2174; 8 Spark's Writ. 148.

Prior to the location of the Federal district† all that portion of land lying on the Potomac, between the present sites of 14th street west and the Arsenal grounds, formed part of an estate known as "*Duddington Pasture.*" (See Rec. I, plat facing p. 325; Rec. VII, plat immediately before p. 2495; see also Rec. VI, third plat from *end*, where the *meanders* of the river are shown.

And of this estate the original proprietor was *Notley Young.*

On June 29, 1791, Notley Young conveyed, in effect, all his lands, "*with their appurtenances,*" situate within certain limits of the Maryland cession, unto Thomas Beall,‡ of George, and John M. Gantt,§ trustees, for the purpose of founding a Federal city, the last call of the conveyance

*The first President remained for some time undecided whether to locate the new city at the mouth of the Eastern Branch, which seemed to offer extraordinary natural advantages, or upon lands on the Potomac below and adjacent to Georgetown, which might extend substantial assistance to the new city, when seated on its border, and derive, also, from the proximity of that city, an increase in the value of its property. (Rec. VII, 2167–2168.)

†As early as Sept. 9, 1791, the Commissioners had concluded that the Federal district should be styled "The Territory of Columbia," and the Federal city, "The city of Washington." (Rec. VII, 2202.)

‡Under act of Md., Dec. 25, 1789, ch. 23, sec. 1, (Davis' Laws, D. C., 478, 2 Kilty,) made alderman of the corporation of Georgetown during good behavior.

§Under the same act made recorder, upon like tenure, of that corporation.

He was afterwards appointed clerk by the Commissioners to record the certificates of divisions made between themselves and the original proprietors.

being "by and with the waters of the Eastern Branch, Potomac River, and Rock Creek, to the beginning."

Rec. V, 46–50; VI, 139–142; Burch Dig. 330–334.

The form of this conveyance appears to have been prepared by Commissioner Johnson, at the request of the first President, (Rec. VII, 2178, 2183,) and was observed, substantially, by most of the original proprietors, (Rec. V, 20–45,) except that Notley Young alone reserved (besides his "*mill*") his "*garden*," (VII, 2183; VI, 195; IV, 1991; III, 1031,) the location of which is shown in the second plat from the end of Rec. VI.

In this conveyance it was provided, in effect, amongst other things—

That such lands, streets, squares, parcels, and lots, as the President might deem proper, should be conveyed by the trustees to the Commissioners, and their successors, for the use of the United States, forever;

That the streets should pass to the use of the Government free of charge;

That for such squares, parcels, and lots as might be reserved for the uses of the Government, the original proprietor should receive payment at the rate of £25 ($66.65) per acre, in the currency of Maryland;*

That, as to the residue of the lots into which the granted land might be divided, "a fair and equal division of them" should be made between Mr. Young and the Government, and, if no other mode of division should be agreed on, "every other lot alternate" of such residue should fall to Mr. Young, as original proprietor, on the one part, and to the public on the other;

* As the streets were to pass gratuitously, this payment of £25 per acre would be reduced, in effect, it was conceived by Mr. Jefferson, to £19 per acre. (Rec. VII, 2181; 2 Scharf's Md. 568.)

Such lots falling, on division, to the original proprietor, as well as any of his land which might not be laid out in the city, were to be conveyed to him by the Trustees;

That the lots falling, on division, to the use of the Government should be sold, under the directions of the President, and, upon like directions, conveyed by the trustees "to the respective purchasers, *according to the terms and conditions of such purchases;*"

And that the proceeds of sale should be applied, in the first place, to payment of the original proprietor, at the rate already mentioned, and thereafter, and as to the residue, delivered to the President "as *a grant of money*," to be used and employed in conformity with the act of Congress of July 16, 1790.

It was also provided that the original proprietor, at his desire, and in case it could be conveniently done, with reference to the arrangements of the streets, lots and the like, might retain his buildings, mill, garden and graveyard, upon making payment therefor to the Government, at the rate of £12 10s. per acre in such currency. (Rec. V, 46–50; VI, 139–142.)

Though nothing could have been more impolitic and unreasonable than the unnecessary effacement of the few improvements testifying to the presence of man within the boundaries of the original proprietors, this rate was evidently based upon the assumption that, under the general scheme of division, the land would be apportioned equally between the original proprietor and the public, and was worth but £25 per acre.

The original proprietor, being entitled to *one moiety* of the land thus improved or consecrated, by paying to the Government £12 10s. per acre for the *whole* of such land, would pay, of course, in effect, £25 per acre for *that moiety*

of the land *which might be lawfully claimed by the public.**

The act of Maryland, 1791, ch. 45, passed December 19, 1791, ratifying her cession, recites (section 1) that *Notley Young*, Daniel Carroll, of Duddington, and many others, proprietors of the greater part of the land hereinafter mentioned to have been laid out in a city, came into an agreement, and have conveyed their lands in trust to *Thomas Beall*, son of George, and *John Mackall Gantt*, whereby they have subjected their lands to be laid out as a city, given up part to the United States, and subjected other parts to be sold to raise money, as a *donation*, to be employed according to the act of Congress for establishing the temporary and permanent seat of the Government of the United States under and upon the terms and conditions contained in each of the said deeds"; that the President had thereafter directed to be laid out upon such lands, within certain boundaries designated in the enactment, a city, which had since *been called the city of Washington*, and "that an inconvertible title ought to be made to the purchasers, under public sanction." (Burch Dig. 217–218; Davis' Laws, D. C., 64–65; 2 Kilty.)

By section 2, that portion of the "territory called Columbia," lying within the limits of that State, was ceded and re-

* On March 24, 1796, *Dermott* stated an account as of *December* 3, of that year, between Notley Young and the Commissioners, for squares retained by Young for his improvements, and therein charged the original proprietor for the *entire* contents of those squares, amounting to upwards of 12 acres, at the rate of £12 10s. per acre. (Rec. VII, 2245–2246.)

Yet, on February 28, 1799, in answering certain inquiries from the Commissioners, (Rec. VI, 210,) he remarks: "If Mr. Young obtained the squares for his improvements he paid but 12½ pounds per acre for what they contained, agreeably to the deeds in trust." (Rec. VI, 217.) This, in a certain sense, is true, but the statement is misleading.

linquished to Congress and the Government "in full and absolute right and exclusive jurisdiction as well of soil as of persons residing or to reside thereon," pursuant to Art. 1, Sec. 8, of the Constitution of the United States, "*Provided*," it was declared, "That nothing herein contained shall be so construed to vest in the United States any right of property in the soil as to affect the rights of individuals therein otherwise than the same shall or may be transferred by such individuals to the United States." "*And provided, also*, That the jurisdiction of the laws of this State over the persons and property of individuals residing within the limits of the cession shall not cease or determine until Congress shall, by law, provide for the Government thereof," as authorized by that article of the Federal Constitution. (2 Kilty; Burch Dig. 218–219; Davis' Laws, 65–66.)

Similar language had been employed in the act of cession from the State of Virginia. (13 Hen. Stat. 43; Burch Dig. 213–214; Davis' Laws, 59.)

By section 3 of the Maryland statute, it is provided, that "all persons to whom allotments and assignments of lands shall be made by the commissioners, or any two of them, on consent and agreement, or pursuant to this act, without consent, shall hold the same *in their former estate and interest* * * * *and as if the same had been actually reconveyed pursuant to the said deed in trust.*" (Burch Dig. 220; Davis' Laws, 66–67.)

It is enacted by section 5 that "all the lots and parcels which have been, or shall be, sold to raise money * * * *shall remain and be to the purchasers, according to the terms and conditions of their respective purchase.*" (Burch Dig. 221; Davis' Laws, 68; 2 Kilty.)

By the same section, a purchase, when made from one claiming title, and for *five years* prior to the statute *in*

possession, either actually or constructively through those under whom he claimed, was rendered unassailable, and the true owner must pursue the purchase money in the hands of the vendor.

Section 7 declares that the Commissioners "may appoint a clerk for recording deeds of land within the said territory, who shall provide a proper book for the purpose, and therein record, in a strong, legible hand, all deeds, duly acknowledged, of lands in the said territory delivered to him to be recorded, *and in the same book make due entries of all divisions and allotments of lands and lots made by the Commissioners in pursuance of this act, and certificates granted by them of sales, and the purchase money having been paid*, with a proper alphabet in the same book of the deeds *and entries* aforesaid." (Burch Dig. 221–222; Davis' Laws, 68–69; 2 Kilty.)

The 9th section requires that the Commissioners "shall direct an entry to be made in the said record book of every allotment and assignment to the respective proprietors in pursuance of this act." (Burch Dig. 222; Davis' Laws, 69; 2 Kilty.)

The first *proviso* in this statute does more than admit the principle of public law, that the cession of territory from one power to another does not affect the rights of private property, and the second, following, in effect, the *proviso* contained in section 1 of the act of Congress of July 16, 1790, (1 Stat. 130,) does more than concede the principle that, for the avoidance of general confusion, the laws, usages, and municipal regulations of the ceded country must continue in force until the new sovereignty has deemed proper to alter or to supersede them.

These provisos were not designed to recognize merely general propositions.

They and the enactment in general were framed at a period not over-confident, for the purpose of establishing express *reservations* in the acts of cession and emphatic *declarations* of the conditions upon which the cession was intended to repose.* (2 Scharf's Md. 569.)

"The United States," observes Mr. Justice Taney, "accepted the cession made by this law of the State, and the conditions above mentioned therefore formed a part of the contract between the parties."

Van Ness *v.* Bank U. S., 13 Pet. 19.

That the legislature of Maryland was aware, at the time of the passage of this enactment, of the conveyances by which the original proprietors had dedicated their lands "to be laid out as a city," and of the directions of the President in respect to that city, is rendered certain from the first section of the act itself.

But a comparison of the phraseology of other sections of the act with the terms employed in the conveyances from Notley Young and others, discloses, that the legislature was

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*To the Articles of Confederation the consent of the State of Maryland was the last to be obtained. (1 Ell. Deb. 99; 1 Story Const. §§ 225–228.)

Her convention, after a struggle, (2 Scharf's Md. 547,) had, indeed, ratified the Constitution of the United States by a very large majority, (2 Ell. Deb., 508,) yet some of the ablest minds in that convention, including Thomas Johnson and Samuel Chase, (2 Ell. Deb. 514–515,) both afterwards Justices of this Court, Luther Martin, (1 Ell. Deb. 381, 2 *id.* 515,) Attorney-General of the State at the time of the passage of her Act of Assembly of December 19, 1791, (2 Har. and McHen. VIII, 481,) and, by tradition, framer of the same, and William Pinkney, (2 Ell. Deb. 515,) whose spell warmed into imagery, "the cold investigating faculty" of Mr. Chief Justice Marshall himself, (9 Cranch. 430,) were strongly opposed to the instrument as originally adopted.

also acquainted with the language of these conveyances, much of which language is repeated in the act.

On September 8, 1791, the Commissioners had addressed a memorial to the legislature of Maryland, indicating the advantages that must result from having the subject of wharfing "under proper regulations from the beginning," and submitting whether it might not be appropriate for that legislature to enable the Commissioners, or some other corporation, until the assumption by Congress of the government of the district, "to license the building of wharves, of the materials, in the manner, and of the extent they" might "judge *desirable* and convenient, and agreeing with general order." (Rec. VI, 271-272.)

It was hence declared, in section 12 of the act of Maryland of December 19, 1791, ratifying her cession, that, until such assumption by Congress, the Commissioners should have power "to license the building of wharves" on the Potomac and the Eastern Branch, adjoining the Federal city, "of the materials, in the manner, and of the extent they" might "judge *durable*, convenient, and agreeing with general order, but," it is immediately provided, "no license *shall be granted to one to build a wharf before the land of another;*" no wharf shall be erected without license from the Commissioners, and any wharf erected without such license, or different therefrom, is declared a common nuisance.

Burch Dig. 223; Davis' Laws, D. C., 70; 2 Kilty.

Upon this provision of section 12 of the act of Maryland of December 19, 1791, when read in connection with the memorial from the Commissioners suggesting that provision, several reflections occur.

1. On the plan of the city of Washington, prepared by Major *L'Enfant* in 1791, (Rec. VI, map immediately after p. 352,) certain wharves were plainly exhibited opposite *six* of the squares taken from the land of Notley Young, and opposite numerous squares situate on the Eastern Branch, and between all of such wharves and the squares opposite which they were so exhibited, as well as between the water and many squares opposite which no wharves were thus exhibited, a street, or opening answering the description and purposes of a street, was left and delineated on the plan.

2. Of the provision in this plan for a street, or equivalent opening, along the water, neither the Commissioners nor the legislature of Maryland can be supposed to have been uninformed.

The outlines of the L'Enfant plan had been settled on April 12, 1791, (Rec. VI, 300,) and the plan, with corrections by him previously directed, presented to the first President on August 19, 1791, (Rec. VII, 2193, 2200,) by whom, in accordance with his intimation of October 25, 1791, (Rec. VI, 302; VII, 2204,) it had been placed before Congress on December 13, 1791. (Rec. VI, 273, 302; VII, 2208.

On September 9, 1791, (Rec. VII, 2202,) the day following the date of their memorial to the legislature of Maryland, the Commissioners informed Major L'Enfant that they had concluded to style the Federal district "The Territory of Columbia," and the Federal city "*The city of Washington;*" that the title of his plan would, therefore, be "*a map of the city of Washington, in the territory of Columbia;*" that the streets were to be named "alphabetically one way and numerically the other; the former divided into north and south letters, the latter into east

and west numbers, from the Capitol," and that they desired about 10,000 copies of the map "struck off, on the best terms, and as soon as possible." (Rec. VII, 2202.)

We have already seen, that in section 1, of the act of Maryland of December 19, 1791, it is recited that the President had directed to be laid out, within the cession, a city, "which has since been called the *city of Washington*," and that the cession confirmed by section 2 of the act, is of that portion of the "*territory called Columbia*," within the limits of that State.

On the whole, the Commissioners, undoubtedly, and the legislature of Maryland, it may be presumed, at the time of the passage of the act of December 19, 1791, were aware of the water-street feature of the plan of L'Enfant.

3. It is not to be admitted, that men of any considerable experience or intelligence could contemplate the regulation, through licenses, of the manner of erecting wharves, on navigable waters, at any city designed to be at all commercial, without contemplating, at the same time, the existence or establishment of some public road, way, or street, to promote convenient communication with such wharves, and to define the boundaries from which they were to proceed riverward or seaward.

4. The language, and the operation of the language, of the act Congress of July 16, 1790, of the conveyances made by the original proprietors to Beall and Gantt, and of the act of Maryland of December 19, 1791, were, it is obvious, on the latter date, precisely what they are at present.

If, through the effect of any terms contained in those statutes or in those conveyances, the United States, on December 19, 1791, would become sole owners, in fee, of the land embraced in every street laid out or to be established along the water, at this city, with the exclusive right,

as such owner, to erect wharves, from or in front of such streets, what explanation is to be offered of that provision of section 12 of the Maryland statute of that date, which declares that "no license shall be granted to *one* to build a wharf before the land of *another?*"

Every mind must perceive that the provision, under such circumstances, would have been fatuous and insensible.

A wharf, to be such, except in name, must project either from the shore or from some artificial erection proceeding from the shore.

And as the Commissioners were already disabled, by the fundamental principles of society, from conferring upon one person the property of another, they were already disabled from granting to one person authority to erect a wharf *out from*, or to any extent *upon*, the land of another.

But it was foreseen by the legislature of Maryland that streets would exist, at the Federal city, along the Potomac and the Eastern Branch, and that through wharves erected from such streets, commerce and navigation, upon those streams, would find their accommodation.

And in order that the value of private property, abutting upon such streets, might not be injuriously affected by any exercise of the general power conferred upon the Commissioners, the Commissioners were prohibited by the legislature from giving to any person authority to erect a wharf "before" land which he did not own.

In the letter addressed by John Nicholson to the Commissioners, on September 30, 1796, for the preposition "before" found in this act, he employs the words "in front of," (Rec. VI, 188,) in which words, indeed, are contained the definition first given by Webster of that preposition.

That the existence of Water street was not supposed to be destructive of the private rights sought to be protected by this section of the statute, seems to be conceded in the opinion given to President Monroe by Mr. Attorney-General Wirt, on July 8, 1818.

For, in pointing out certain objections (founded upon a situation he then conceived to exist) to the wharfing regulations established by the Commissioners in 1795, he remarked:

"The law of Maryland itself, from which the Commissioners derive their power, imposed one specific restriction on its exercise, which was, that no license should be granted to one to build a wharf before the lands of another. But in casting the eye over the Commissioners' diagram, it will be seen that a wharf, projected at right angles from Water street to the channel, will not only cross the course of the streets, but pass over so as to lie 'before the lands of another,' in direct violation of the act." (Rec. VI, 346.).

What was thus done, or required to be effected, by the proprietors, the Commissioners and the legislature of Maryland, in attempting the establishment of the Federal city, reflected, in many respects, and as fully, perhaps, as circumstances would permit, only the customs of the province and the State.

The overthrow of the Calvert authority by Ingle, the disorders incident to the rise and fall of the English Commonwealth, the removal of the seat of the provincial government from St. Mary's to Annapolis, and the work of

fire, are supposed to have resulted in the loss of many of the earlier enactments of the proprietary establishment.

Bacon's Laws, Md.,* (Annap., 1765,) Preface.

Fisk's Old Dominion and Her Neighbors, Vol. 1, pp. 306, 308, 318; Vol. 2, pp. 135–136. (Boston, 1897.)

It is said, however, that "the first attempt to establish towns, ports, and places of trade within this Province" appears in the act of 1683, ch. 5, entitled "*An Act for Advancement of Trade.*" (Bacon's Laws Md.)

By that act numerous localities are designated as the sole places at which imports may be unladen or sold, and at which domestic products and manufactures must be bought for export or sale, after August 8, 1685.

The act appointed Commissioners in the several counties of the Province, to purchase, at designated localities, tracts of 100 acres of land, and to cause such land to be surveyed and laid out into streets, lanes, alleys, open spaces and building lots. Where the original proprietor refused, or was under legal incapacity, to sell, the Commissioners, with the assistance of a jury, were to resort to condemnation.

The original proprietor was entitled to first choice in one only of the lots. At prices fixed by the Commissioners, the residue of the lots were to be sold, upon conditions for the erection, by each purchaser, of a sufficient house, not less than twenty feet square, upon every lot he might buy, before the end of August, 1685, and for payment of the purchase-money by the purchaser unto the original proprietor.

* "Rev. Francis Bacon, rector of All Saints' parish, in Frederick County, a man of great learning, excellence and intelligence." (1 Scharf's Md. 362.)

Of any lots not purchased within five years from the proclamation of the act, the original proprietor was to stand possessed as in his "*first and former estate.*"

The act contemplates the execution to the purchaser of no deed or other muniment of title.

The Commissioners are required to "appoint a person to keep a book, wherein to enter down each man's choice of any respective lot," and it is provided, that the entry in such book of any lot, by the taker-up thereof, and his compliance with the conditions of payment therefor and building thereon, "shall invest the said taker-up and builder with an estate of inheritance in said lot, to him, his heirs and assigns, forever."*

Bacon's Laws Md. (Annap., 1765.)

Supplementary and additional to the above, and preserving its general features, were—

Acts of Md., 1684, ch. 2; 1686, ch. 2, and 1686, ch. 6; Bacon's Laws Md.

This method of acquiring lands on navigable water, and erecting them into towns, with streets, lanes, alleys, public reservations and building lots, the concession to the original proprietor of the privilege of selecting one of the lots, and the creation of a *statutory title* in purchasers, as the result of their compliance with the conditions of payment and building, became fixed principles in the legislation of the province.

* *Cf.* Act Md., June 2, 1751, ch. 25, creating Georgetown, and which, in sec. 6, provides, in effect, that the taker-up and purchaser, upon payment and entry made thereof, "shall, and is hereby declared to be, by virtue of such payment * * * and entry thereof made as aforesaid, and this act, fully and absolutely invested and seized of and in an estate of inheritance, in fee simple, * * * without any deed, conveyance, or other transfer, * * * any statute, law, usage or custom, to the contrary notwithstanding." (1 Kilty; Davis' Laws, 472.)

"The situation was always on some one of the navigable streams or estuaries, in which both shores of the bay abound, furnishing cheap and convenient means for the exchange of commodities with their neighbors, or with the outside world."

1 Scharf's Md. 411.

"The mode of erecting a town was nearly always the same. Commissioners were appointed to agree with the owner of the land for a tract of fifty, a hundred, or more acres, which was then staked off and divided into lots of an acre each, intersected by proper streets, lanes and alleys. The lots being numbered and prices attached to them, the owner of the land was allowed to select one lot, and the rest, or so many as there were applications for, were divided among the 'takers-up,' who received the freehold in consideration of a yearly quit-rent, usually of one penny, to the Lord Proprietary."

Scharf's Md. 411.*

Amongst other illustrations may be cited the following:†

Act Md., 1694, on the Severn, *Ann-Arundel*, afterwards by act Md., 1695, ch. 7, designated *Annapolis*. (Bacon's Laws Md.)

Act Md., 1708, on Britton's Bay, *Sheppard's*, afterwards, by acts Md., 1710, ch. 6; 1728, ch. 16, designated *Seymour-Town*. (*Id.*)

Act Md., 1729, ch. 6, at head of Port-Tobacco Creek, *Charles-Town*. (1 Kilty Laws Md.)

Act Md., 1729, ch. 12, on the Patapsco, *Baltimore-Town*.

* In act of Md., 1751, ch. 25, creating Georgetown, section 15, (1 Kilty; Davis' Laws, 474,) is reserved "the yearly rent of one penny sterling money for each respective lot."

† It is true that these, for the most part, were but paper towns—speculations which ended, ordinarily, only in disaster. (1 Scharf's Md. 411, 2 *id.* 66–67.)

But the scheme upon which they were founded, furnished various analogies for the Federal city.

Act Md., 1730, ch. 6, at Broxon's Point, *Cæcil-Town.*

Act Md., 1732, ch. 6, on the Chester, *Ogle-Town.*

Act Md., 1732, ch. 15, on the Wicomico, *Salisbury-Town.*

Act Md., 1732, ch. 18, on the Chester, *Kings-Town.*

Act Md., 1732, ch. 21, on the Patuxent, *Benedict-Leonard-Town.*

Act Md., 1732, ch. 24, on the Choptank, *Bridge-Town.*

Act Md., 1733, ch. 3, on the Patapsco, *Jansen-Town.*

Act Md., 1733, ch. 13, on the Monokin, *Princess-Anne-Town.*

Act Md., 1736, ch. 19, on the north side of the Sassafras, *Frederick-Town.*

Act Md., 1736, ch. 21, on the south side of the Sassafras, *George-Town.*

Act Md., 1742, ch. 11, on the Pocomoke, *Snow-Hill-Town.*

Act Md., 1742, ch. 13, on E. Branch Patowmack, *Bladensburg.*

Act Md., 1742, ch. 23, on North-East River, *Charles-Town.*

Act Md., 1744, ch. 23, on Indian River, *Baltimore-Town.*

Act Md., 1751, ch. 25, on the Patowmack, above the mouth of Rock Creek, *George-Town.*

1 Kilty Laws Md.

Act Md., 1785, ch. 32, near Miles River, *Talbot*, afterwards, by act Md., November, 1788, ch. 16, designated *Easton.* (2 Kilty.)

If the methods observed in Maryland for the establishment of towns had furnished certain analogies for the

creation of the city of Washington, the fate which had overtaken most of these towns was such also as threatened that city from the beginning.

From the summer of 1783, when Congress had been forced to retire from Philadelphia, through the disorder of raw levies in a particular line, the necessity of establishing the seat of Government where, for purposes of self-protection, at least, Congress might find itself supreme, was supposed to have been universally acknowledged.

8 Spark's Writ. 454–459.

5 Marsh., Life of Washington, 259.

2 Story Court, 1219.

Davis' Laws D. C., 2–7.

2 Scharf's Md., 563–564.

Fort Leavenworth R. R. Co. *v.* Lowe, 114 U. S. 528–529.

On December 23, 1784, Congress had enacted an ordinance for the appointment of three Commissioners to purchase and lay out land on the Delaware, near the falls thereof, and to contract for the erection and completion, "in an elegant manner," of buildings suitable for the accommodation of Congress and of the various officers of Government, at an expense not exceeding $100,000, in the aggregate.

In February and March, 1785, Commissioners had been selected by Congress, accordingly, but the opposition of certain of the Southern representatives to the necessary appropriation, which, under the 9th of the Articles of Confederation, required the concurrence of nine of the States, had rendered the ordinance ineffectual.

5 Marsh., Life Washington, 259.

Davis' Laws D. C., 20–24.

1 McMaster's History U. S. 251–253.

The 6th article of the draft submitted by *Charles Pinckney* to the convention which framed the Constitution, (2 Mad. Pap. 740, 3 *id.* Appx. No. 2, pp. v–vi,) after being sent to the Committee of Five, (1 Ell. Deb. 184, 248, 254, 278,) and altered first by the Committee of Eleven, (*id.* 314, 4 *id.* 174, 3 Mad. Pap. 1494,) and afterwards by the Committee on Revision, (1 Ell. Deb. 4; 4 *id.* 189; 3 Mad. Pap. 1550,) was adopted as that portion of the 8th section of the 1st article of the Constitution which confers upon Congress power "to exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by the cession of particular States and the acceptance by Congress, become the seat of the Government of the United States."

The importance of this provision had been illustrated and explained by Mr. Madison, in No. 43 of the Federalist, but it had been assailed, nevertheless, in several of the State conventions, when assembled to ratify the Constitution, with unsparing severity. (2 Story Const. §§ 1220–1221.)

"The plan of the Federal city," it was declared in New York, "departs from every principle of freedom, as far as the distance of two polar stars from each other," and subjects to the exclusive legislation of Congress inhabitants without voice in popular government. The proposed city was ridiculed as "this happy place where men are to live, without labor, upon the fruits of others; this political hive where all the drones in society are to be collected to feed upon the honey of the land."

2 Ell. Deb. 375–376.

And it was proposed by the Convention of that State, in ratifying the Constitution, that the same be so amended as to subject the inhabitants of the Federal district to like

taxation as might be imposed upon the inhabitants of the States from which that district should be carved, and to render all persons within such district liable to arrest for crimes committed and for debts contracted beyond it.

4 Ell. Deb. 219.

By the meeting held at Harrisburg, Pa., in September, 1788, the house of representatives of that State are petitioned to obtain a revision and amendment to the Constitution so as to limit the right of exclusive legislation by Congress over the seat of Government "to such regulations as respect the police and good government thereof."

2 Ell. Deb. 500, 503–504.

A similar amendment was proposed in the ratifying convention of Virginia, (3 Ell. Deb. 595,) where opposition to this feature of the Constitution was expressed with great animation, and by none more strongly than by *George Mason*, author of the proposed amendment.

Grigsby's Va. Conv. of 1788, pp. 69-70.

"What sort of a jury," he inquires, "shall we have in the ten miles square?—The immediate creatures of the Government." "If an attempt should be made to establish tyranny over the people, here are ten miles square where the greatest offender may meet protection. If any of their officers or creatures shall attempt to oppress the people, or should actually perpetrate the blackest deeds, he has nothing to do but get into the ten miles square. Why was this dangerous power given? Felons may receive an asylum there and in their strongholds." He would willingly give them exclusive power, as far as respected the police and good government of the place, but he would give them no more, because more was unnecessary.

3 Ell. Deb. 399–400, 408.

Mr. *Grayson* contended in the same vein.

"The executive of a State is to apply to that of another for the delivery of a felon. He cannot apply to the ten miles square. It was often in the contemplation of Congress to have power of regulating the police of the seat of Government, but they never had any idea of exclusive legislation in all cases. The power of regulating the police and good government of it will secure Congress against insults. What originated the idea of the exclusive legislation was some insurrection in Pennsylvania, whereby Congress was insulted on account of which it is supposed they left the State."

3 Ell. Deb. 401–402.

"They have a right, by this clause," exclaimed *Patrick Henry*, "to make a law that such a district shall be set apart for any purposes they please, and that any man who acts contrary to their commands, within certain ten miles square, or any place they may select and strongholds, shall be hanged without benefit of clergy."

"Will not this clause give them a right to keep a powerful army continually on foot, if they think it necessary to aid the execution of their laws? Is there any act, however atrocious, which they cannot do, by virtue of this clause?" "The people within that place, and the strongholds, may be excused from all the burdens imposed on the rest of society, and may enjoy exclusive emoluments to the great injury of the rest of the people." "No instance can be given of such a wanton grasp of power, as an exclusive legislation in all cases whatever."

3 Ell. Deb. 403–405.

When, at the first and second sessions of the first Congress, held at the city of New York, an attempt was made to fix the permanent seat of the Government, that attempt

had been attended not only with very significant fluctuations of opinion, but with a display of feeling but little calculated to increase the veneration inspired by our general estimate of that Legislature.*

The alteration of the limits of the Federal district originally prescribed by the act Congress of July 16, 1790, was viewed with extreme disfavor by many members of the Senate, to wh m that alteration appeared "like unsettling the whole busine s," and who expressed an utmost surprise at the attitude of the President towards it. "The bill was debated with temper," and it was declared "that the expectations of the people had been disappointed." (Maclay, Sketches, &c., 294–295.)

The opposition to the Potomac had been expressed in the House of Representatives, with great variety of argument and illustration.

Against that locality was urged its remoteness and inaccessibility and the supposed insalubrity of its climate, which must compel many members from the North to forego their elections rather than assemble on its banks; the turbulent passions which would be aroused by the removal of the temporary seat of Government from New York, which had, it was said, adopted the Constitution only upon the distinct promise that the temporary seat of Government should be located within her borders; the expense which had been incurred by the city of New York upon the faith of that

* Of the Senators from one of the States, and in reference to a particular crisis of the measure, it is said, "Izard flamed, Butler bounced, and both seemed to rage with madness."

Maclay, Sketches, Debates 1st Senate, 220.

See Washington to David Stuart, 15 June, 1790. (10 Sparks' Writ. 97.)

U. S. v. Cooper, 20 D. C. (9 Mackey,) 118.

agreement, and the want of honesty which would be involved in its breach; the connection between the Potomac plan and the fate of pending measures of finance, of the first importance; the pernicious influences resulting from that connection, and the impossibility of erecting within ten years suitable public buildings on the Potomac; the intrinsic improbability of ever withdrawing the seat of Government from Philadelphia, after its establishment at that city for an entire decade; the absence of all serious intention, on the part of the promoters of the plan, to remove the Government to the "Indian place" of Conococheague; the "mere manœuver" apparent in "the whole business"; the conflict of the measure with the sentiments of the majority in each House, where the like project had already been negatived; the non-acquiescence that must be expected from those States which should consider themselves injured by the measure, and the apprehension that, in case of its adoption, the whole of New England would consider the Union at an end.

1 Bent. Abr. 145–165, 242–250.

The location, at the expiration of ten years, of the seat of Government upon the Potomac had been, indeed, agreed on, but only by the preponderating votes from a single State, and in connection with a "compact," (to borrow the mild language of Judge Marshall,) whereby some $21,500,000 of indebtedness from the States was to be assumed* by the nation as such.

5 Marsh. Life of Washn. 259.

Maclay, Sketches, &c., 126–261.

9 Jefferson's Writ. (*Anas*) 91–95 (ed. 1854.)

1 Bent. Abr. 145, 146, 242, 250.

*This assumption was effected under act Congress, August 4, 1790, Sec. 13. (1 Stat. 142.)

2 McMaster's Hist. 580–583.
Moore's Amer. Cong. 138–141.
Davis' Laws, D. C. 31–50.

The actual selection by Congress of the Potomac, for the permanent seat of Government, produced but little immediate alteration in the sentiments of those by whom that selection had been opposed.

Early in 1791, the House of Representatives of Pennsylvania had appropriated money for the erection of Federal buildings at Philadelphia, though two days thereafter the measure had been postponed in the State Senate, until the next session. (Rec. VII, 2182.)

Upon being informed of the introduction of the bill, the first President, on April 3, 1791, from Mount Vernon, writes to the Commissioners: "This, (though I do not want any sentiment of mine promulgated with respect to it,) marks unequivocally in my mind the desig[illegible] State, and the necessity of exertion to carry the Residence Law * into effect agreeably thereto." (VII, 2178; see *id.* 2177.)

On March 2, 1792, from Philadelphia, he thus unbosoms himself to Dr. David Stuart:

"The half friends to the new city, (if this is not allowing them more than their due,) undertake to predict that it now stands in equilibrio—that a feather will turn the scale either way."

"There is a current in the city † which sets so strongly against everything that relates to the Federal district that it is next to impossible to stem it."

12 Ford's Writ. 104.

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* Meaning the act Congress of July 16, 1790.
† Philadelphia.

See, also, his letter, March 6, 1792, to the Commissioners. (Rec. VII, 2210.)

Again: December 18, 1792, to the Commissioners, he observes that the failure of their attempt to obtain workmen from abroad "fills me with real concern; for I am very apprehensive, if your next campaign in the Federal city is not marked by vigor, it will cast such a cloud over this business, as will so arm the enemies of the measure as to enable them to give it, if not its death-blow, a wound from which it will not easily recover."

12 Spark's Writ. 305.

It is not to be doubted that there existed, from the beginning, an apprehension at once strong and not unnatural, that the seat of Government, if established in actual operation for ten years on the Delaware, would never thereafter be removed to the Potomac.

On October 27, 1790, Mr. Jefferson writes the President, that the former and Mr. Madison had been endeavoring to impress upon some of the members of the Virginia assembly, the expediency of securing two good private dwelling-houses to be erected, annually, for ten years, at the Federal city, and to be rented out or sold for the use of the State. "Should they,"* he adds, "do this, and Maryland as much, it will be one means of ensuring the removal thither."

3 Jefferson's Writ. 196 (Ed. 1854.)

See, also, Life of Robert Morris, (Prof. Sumner,) 145–146.

Travels in America 100 Years Ago, (Twining,) 58.

And, not to mention occurrences in more recent times,

* The Virginia Assembly.

the opposition to the Potomac continued to be expressed by a considerable number of members of the House of Representatives, upon the resolutions offered by Mr. Bacon, of Massachusetts, on February 9, 1803, (2 Bent. Abr. 735–737, 741; Davis' Laws, D. C. 52–53,) as, also, by a very close vote of that House, upon the resolutions submitted therein by Mr. Fisk, of New York, on September 26, 1814. (5 Bent. Abr. 322–326, 329–333, 337–339; Davis' Laws, D. C. 55.)

Under act Congress, August 4, 1790, section 3, (1 Stat. 140,) the bills of credit previously emitted by the United States had been directed to be estimated, for purposes of liquidation, at the rate of one cent in specie for one dollar in such bills, (2 Story Cons. § 1360, note 3,) and the funded debt of the Government amounted, on January 1, 1791, to upwards of $75,000,000. (1 McMaster's Hist. 568, 572.)

Against any, the smallest appropriation, for founding the Federal district, the first Congress had set its face with a sternness and severity but little relaxed in the authority conferred and request made upon the President, by section 4 of the act of July 16, 1790, (1 Stat. 130,) "*to accept grants of money*," for the purchase of lands and the erection of buildings, and that the new city would soon, if ever, become the object of national munificence, few men expected.

For the purpose of erecting public buildings within the Federal city, Virginia, by act of December 27, 1790, had appropriated $120,000, to be paid in three equal annual installments. (13 Hen. Stat. 125.)

For the like purpose, Maryland, accelerating the advance of $72,000, provided in a resolution passed by her assembly in the previous year, by act of December 19, 1791, ch. 45, section 11, directed the treasurer of her western shore to make payment of that sum, from appointed funds, as the same should come into his hands.

2 Kilty; Burch's Dig. 223; Davis' Laws, 70.
See, also, 1 Amer. State Pap., (Miscel.) 245.
2 McMaster's Hist. 484.

On April 13, 1791, the President thus writes the Commissioners, from Richmond, Va:

"Although, by the law of this State, the payments of the one hundred and twenty thousand dollars are to be made by installments, the Governor is well disposed to advance the money at earlier periods; but, alas, the treasury is empty. He has prompted [promised?] me, however, that so soon as he can obtain the above sum, it shall be remitted or made subject to your draught." (Rec. VII, 2185.)

To this letter there is subjointed the following:

"P. S.—Since writing the foregoing, I have again conversed with Governor Randolph, and have drawn upon him, payable to your order, for forty thousand dollars, being the first installment, one thousand of which he hopes to have ready within a few days, the remainder to be subject to your draughts. He will endeavor to transmit the money so as to prevent trouble or inconvenience, but on this head he will write to you himself, more at large." (Rec. VII, 2186.)

The donations received from Maryland and Virginia were soon expended. (2 Scharf's Md. 565–566, 571.)

To induce private means, where such might be found, to turn from their accustomed paths and encounter the

uncertainties of investment upon the Potomac, was an undertaking, at best, of the first magnitude and difficulty.

That any solution of this problem, satisfactory to the President, to Maryland, to the Commissioners, or to others, might be expected, from withdrawing from property when acquired by individuals within the cession, such incidents of value as in the States, in general, and particularly in Maryland and Virginia, would there belong to like property, none it is supposed could be found to affirm.

For, if ever it could be necessary to lend attraction to investments by the offer of special considerations and advantage, the occasion had arisen in connection with capital sought to be influenced towards the banks of the Potomac.

Of the wealth, population, enterprise, arts, discoveries and mechanical inventions, through which cities now rise, as it were, in a day, men of a past century could form no conception.

In 1790, and for long afterwards, but little money was to be found in the country.

Public improvements, the bridge, the school-house, and the library, the hospital, the college, and even the *church*, were erected, or assisted, from the proceeds of the lottery.*

1 McMaster's History, 587–588.

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* In 2 Kilty are found the following acts of Maryland, to raise money, by *Lottery:*

1791, ch. 59, a sum not exceeding $3,500 per annum, for improving the harbor and paving the streets at Baltimore.

1795, ch. 47, confirmed by act Cong. May 6, 1812, (2 Stat. 728; Davis' Laws, 251; 1 Am. Stat. Pap. [Misc.] 259,) $52,000, for the canal begun at Washington, D. C.

1795, ch. 63, $50,000, for improving the navigation of the Susquehanna.

1795, ch. 72, $5,000, for the erection of public wharves at Havre-de-Grace.

The Maryland and Virginia portions of the cession stood completely dissevered by the Potomac.

From the town which, in 1784, had received from the Virginia Assembly the name of Alexandria, (Davis' Laws, 533,) the site chosen for the Federal city was five miles by water and seven miles by land.

It was not until the act of Maryland of December 29, 1791, that a bridge had been *authorized* over the Potomac, at or near Georgetown, (Davis' Laws, 76,) not, until the act of Maryland of December 24, 1795, that a bridge over that river had been *authorized* at or near the Little Falls, (Davis' Laws, 86,) not, until the act Cong. February 5,

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1796, ch. 52, $2,000, for a market-house at Georgetown, D. C.

1797, ch. 14, $10,000, for improving the post-road through Alleghany county.

1798, ch. 67, $3,000, for improving creeks in Prince George's county.

1796, ch. 14, $1,000, to complete a *church*, in Christ's Church Parish: and,

1798, ch. 69, £3,000, to reimburse expenses of erecting a *church* and repairing a *chapel* in St. Paul's Parish.

The efforts of the Commissioners of the District of Columbia, assisted by Mr. *Blodget*, of Philadelphia, between the years 1793 and 1797, to build, by means of "Federal Lottery, No. 1," a hotel at the city of Washington, form an amusing incident in the early history of our Capital.

2 McMaster's Hist. 484–486.

The power conferred by act of Cong. May 4, 1812, section 6, upon the corporation of Washington, to authorize the drawing of lotteries for important local improvements, (2 Stat. 726; Davis' Laws, 249.) gave rise to the controversy in *Cohens* v. *Virginia*, 6 Wheat. 264. And, under the power given by that statute, and by act Congress May 15, 1820, section 8, (3 Stat. 588; Davis' Laws, 347,) numerous ordinances were enacted by the city for raising money, by lottery, for the erecting of public schools, a penitentiary, the city hall, and the like. (Burch Dig. 110–116.)

Clark *v.* Corpn. of Washington, 12 Wheat. 40.

An elaborate and interesting summary of the various lotteries which had been theretofore authorized in Virginia, was given by Mr. Jefferson, in 1826. (9 Jefferson's Writings, 500–550.)

1808, (2 Stat. 457; Davis' Laws, 177,) that the Washington Bridge Company (Rec. VII, 454–524,) was empowered to erect over that river, between Washington and Alexander's Island, a bridge which has since become known as the Long Bridge.

The crude devices of Rumsey and of Fitch had, indeed, appeared a few years before, upon the upper Potomac and along the Delaware. (9 Spark's Writ. 104; 2 Scharf's Md. 525–526; 1 McMaster's Hist. 432–436.)

But the stage coach, over roads at times nearly impassable, the ferry-boat, the sloop, and the canoe, furnished the only practical transportation for freight or passenger.

In one and the same day, a gentleman residing at Philadelphia, may now there breakfast as usual, open and conclude an important discussion before this Court, and dine at home, at his accustomed hour, without inconvenience.

From Philadelphia, on July 11, (*sc.* Wednesday,) 1797, Mr. Jefferson writes the Commissioners:

"I am honored with yours of the 5th instant. The President has left this place this afternoon, being incumbered with lame and sick horses; he was uncertain when he should reach Georgetown—perhaps on Monday morning." (Rec. VII, 2214.)

The site selected for the Federal city was largely in forest and in swamp.

And forest and swamp were to be reclaimed—buildings were to be erected—by those who were expected to become purchasers of public realty at that city.

"But purchasers willing to expend large sums of money

in putting up houses in what was, at best, a wilderness, were difficult to secure." (2 McMaster's Hist. 484.*)

Such investors could be obtained, if at all, by offering them, in respect of their ventures, advantages equal at least to such as might be found in the States in general.

And some advantages had been, in fact, offered, apart from any directly connected with commerce and navigation.

In order to render the erection of one building both a convenience and an inducement for the construction of another, under the provisions of the deeds of trust from the original proprietors, (Rec. V, 48; VI, 141,) and the building regulations declared, in pursuance thereof, by the first President, on October 17, 1791, (Burch Dig. 326; Davis' Laws, D. C. 71–72; Corcoran *v.* Nailor, 6 Mackey 582,) it was made *a condition annexed to the title* of every building-

* See, act Md., 1797, ch. 6, (continued in force by act Md., 1799, ch. 55, to Oct. 30, 1802,) (to encourage the destruction of *wolves*, in Baltimore county.") (2 Kilty.)

Travellers, in 1796, had never known that Washington was a city, except for what was then doing upon the White House and the Capitol. Such streets as were laid out were merely openings through the forest. (2 McMaster's Hist. 486, 487; Twinings' Travels in America, &c., 100–102.)

On December 1, 1795, the walls of the President's House were still within six feet of the eaves, and only the foundation had been laid of the Capitol. (1 Am. St. Pap. [Misc.] 142.)

When, in 1800, the seat of Government was removed thither, the city was scarcely habitable, and was still almost wholly in the woods.

2 McMaster's Hist. 488–489.

1 Henry Adams' Hist. 30–31.

2 Sharf's Md. 606.

Josiah Quincy, on attending Congress in 1805, was compelled to accept accommodations in the family of his friend, Chief Judge Cranch. (Life Josiah Quincy, p. 82, [Bost. 1868.])

lot within the city, that the partition-wall between neighbor and neighbor should be laid equally on the land of each, and that the second builder, upon using any portion of such wall, should reimburse to the first, one-half of the cost of the portion so used.

Miller *v.* Elliott, 5 Cranch C. C. 543; 3 Kent's Com. 438, note *a*.

By section 10 of the act of Maryland of December 19, 1791, and "for the encouragement of master builders to undertake the building and finishing of houses within the said city, by securing to them a just and effectual remedy for their advances and earnings," (Burch Dig. 222; Davis' Laws, 69,) was created, for the first time, in America, the *Mechanic's Lien*, now brought to such a state of development.

Phil. Mech. Liens, § 7 (2d ed.).

Monroe *v.* Hannan, 7 Mack. (D. C.) 202.

Athens sought, by conciliation, to attract the wealth and population of all nations, but she offered to the stranger only the benefits of her enlightened but unaltered law. (Plut. *in vit.* Thes.)

It is recited in the preamble (section 1) of the act of Maryland of December 19, 1791, "that allowing foreigners to hold land within the ceded territory will greatly contribute to the improvement and population thereof," (Burch Dig. 218; Davis' Laws, 65,) and by section 6 of the same enactment, the alien became a citizen, in the right of acquiring and transmitting real property *situate in the District of Columbia*, but was left, as to land *within the State*, under the disabilities of the common law.

Burch Dig. 221; Davis' Laws, 68.

Dawson's Lessee *v.* Godfrey, 4 Cranch. 321.
Spratt *v.* Spratt, 1 Pet. 343.
Spratt *v.* Spratt, 4 Pet. 393.
Geoffroy v. Riggs, 133 U. S. 265–266.

And in foreign countries was circulated the engraved plan of the city. (Rec. VI, 304–305, 295, 334; VII, 2225.)

MODIFICATION, IN PRACTICE, OF THE PUBLIC DOMINION ASSERTED OVER THE SHORES OF NAVIGABLE WATERS.

Though the shores of waters, either navigable in fact or within the ebb and flow of the tide, are commonly mentioned as part of the *jus publicum*, this principle has been, at times, greatly modified in practice, in perhaps nearly every country in which it theoretically existed.

Rivers and the seashore, by the Roman law, were *res omnium communes*.

Gaius, Com. 2, section 1, pp. 209–210. (Thompk. & Lem. Lond. 1869.)

But there can be little doubt that, from the time almost of the Republic, with the division of lands acquired by conquest, were allotted the waters immediately bounding those lands; and these lands, despite the *lex Licinia*, were gradually absorbed by men of wealth and power.

Seneca, in adverting to the vast possessions which he saw accumulated in private hands, declares: *Illustrium flum-*

inum per privatum decursus, et amni magni magnarumque gentium termini, usque ad ostium a fonte, vestri sunt. Ep. 89.

Opera, edit. *Biponti*, vol. 8, p. 356. 1782.

When, in *Spain*, the Peninsula was overrun by the *Goths* and *Visigoths*, with the distribution of the conquered lands, the water courses were parcelled out as appurtenances, after the custom of the Romans.

Al hacerse la distribucion de los terrenos, se comprendian en los mismos las aguas, como acontecia en la distribucion de las conquistas romanas.

Ensayo sobre Las Aguas; Franquet y Bertran, tomo 1, p. 38.

And though by the *Customs of Tortosa*, established in 1149, it was declared that the shores of rivers belonged to the public, and were holden for the common use, (2 *id.* p. 224,) yet this public emolument was limited by the dominical rights which had long been vested under actual concessions in the proprietors of the adjacent soil. (1 *id.* 171–173.)

Water courses, whether navigable or otherwise, were, in *France*, formerly the property of the owners of the adjacent lands.

De la propriété des Eaux Courants, No. 377, *par M. Championniere.*

Nor is any trace to be found in the early legislation of that country, of a distinction in the nature of the rights of the public over waters and over lands. (*Id.* No. 379.)

Before the 16th century the proprietor of the shore had possessed the adjacent water course by title no less valid

than that with which the king had held his crown. An *Ordonnance* of Louis XIV, passed in 1669, had indeed affected to seize into the hands of the monarchy all the navigable waters of the kingdom.

Mais la puissance du droit et de la possession, observes M. Championniere, *fut plus grande que celle de Louis XIV, et la despotique et impérieuse appropriation de l'ordonnance se réduisit d'abord à une tentative d'impôt, puis à peu près à rien du tout.* (*Id.* No. 382.)

The *Ordonnance* of 1669 was succeeded by the edict of 1683. By that edict, though it asserted, as a principle, that great streams and navigable waters were the property of kings and sovereigns, it was, nevertheless, declared, that his majesty, yielding to the remonstrance of his subjects, had confirmed in their rights all such riparian proprietors as had derived their titles from the crown under grants made prior to the year 1566. And by a further edict, promulgated in 1693, this confirmation was made to embrace every private right, without reference to the antiquity of the title or its deraignment from the Government. (*Id. ib.*)

But the usurpation which the *king* had only attempted, the *Revolution* of 1789 accomplished.

By the law of November 24, 1790, all navigable waters were declared dependencies of the State.

To the retention of this law is now due *Article* 538 of the *Code Civil.*

In the law of *Scotland*, the shore is considered as com-

prehending the land which lies between high and low-water mark.

Bell's Com. Law Scotland, § 641 (3d edit.)

But the shore is not there regarded as property reserved to the king. It is "presumed to be granted as part and pertinent of the adjacent land, under burden of the king's right as trustee for the public." (*Id.*, § 642.)

As to What is Supposed to Have Constituted the Law of England on This Subject Before the Time of Lord Hale.

If confidence may be reposed in the conclusions drawn by a modern writer from the abundant materials which his great learning and unequalled researches have brought together and to light, there can be no doubt, whatever, that, in England, before the time of Elizabeth, (and in Scotland down to 1849,) the title *of the subject*, when owning land upon the seashore, or other tidal waters, extended, *prima facie*, to low-water mark; and that previous to the reign of that sovereign, no one had ever imagined the contrary; (Moore's Hist. of the Foreshore, Int. XXVIII, XXXI, 3d ed., Lond., 1888;) that the opposite principle, that, *prima facie*, the foreshore belonged *to the Crown*, was invented and announced, for the first time, in the treatise published by *Diggs*, (*id.* Int. XXXI, 181-211,) *circ.* 1568–1569, (10th or 11th Eliz.,) but was ever judicially repudiated, (*id.* Int. XXXI,) until, in 1628, (3 Car. I,) affirmed in Attorney-General *v.*

Philpott,* (*id.* Int. XXXI, 895 *et seq.*,) "under pressure" from the king, by "corrupt judges," (*id.* Int. XXXI, 479,) whose judgment was, nevertheless, long, abortive, and who themselves were impeached; (*id.* Int. XXXI, 281;) that the attempt to enforce a *prima facie* title in the foreshore, in favor *of the crown*, formed one of the causes of revolution against Charles I; that in the remonstrance from the Commons, in 1641,† was alleged in article 26, "the taking away of men's rights under color of the king's title to land between high and low-water marks," (*id.* 310;) that the few attempts made during the Commonwealth to establish such a title *for the State* were either voluntarily abandoned or successfully resisted, (*id.* Int. XXXI–XXXII, 312,) but that, upon the Restoration, the claims of the crown to the foreshore were revived and asserted with extreme latitude; (*id.* 312–313;) that in the treatises of Lord Hale, *De Portibus Maris*, (*id.* 319 *et seq.*,) and *De Jure Maris*, (*id.* 371 *et seq.*,) the former composed in 1667, (*id.* Int. XXXII,) that writer, though he had expressly asserted the *prima facie* title of the Crown to the foreshore, had rested his assertion only upon the authority of Attorney-General *v.* Philpott, (with one further case, of which Lord Hale had clearly doubted the relevancy,) and that, as to this authority, it might be supposed that his lordship was either ignorant of what

*In 35 Geo. III, (*circ. an.* 1795,) counsel for the Crown, in Attorney-General *v.* Richards, (2 Anst. 60,) before the Exchequer, cited Attorney-General *v.* Philpot, mentioning that it had been determined by that court in 8 Car. I, which would be *circ. an.* 1633.

A note in 2 Anst. XIII, to the cases cited in that volume, which was published in 1796, indicates that Attorney-General *v.* Philpot had never before appeared in any book of Reports.

† It might be interesting to inquire whether this article supplied a *precedent* where the situation itself had created a necessity, for the Colonial Ordinance of Massachusetts, commonly known as that of 1641, though really adopted, it is said by Mr. Justice Gray, in 1647, (152 U. S. 18,) the year before the English Commonwealth.

had transpired in connection therewith, or had feared, "in the middle of the reign of Charles II," to omit the solitary decision which favored the royal pretension; (*id.* Int. XXXII;) that it was evident, from the language of each treatise, that its author was alive to the fact, "*that the foreshore had been almost wholly, if not wholly, granted out, throughout the coasts of the kingdom;*" (*id. ib.;*) that the theory of Lord Hale had, nevertheless, been substantially, and without investigation, followed in the English courts down to the present day, (*id.* 651,) and with no more extensive concession than that of "a possibility" that the crown might have parted with the foreshore, (*id.* Int. XXXII,) and that as it had generally been the language of those tribunals, that the foreshore belonged to the crown, *except as granted to the subject*, so common had become the impression of the infrequency of such grants, that the exercise by the adjacent landholder of acts of dominion over the foreshore, was viewed as an usurpation, whereas, there existed "the strongest probability of an absolutely legal origin" for the rights thus asserted. (*Id.* Int. XXXIII–XXXIV.)

"In England, from the time of Lord Hale, it has been treated as settled, that the title in the soil of the sea, or of arms of the sea, below ordinary high-water mark, is in the king, except so far as an individual or a corporation has acquired rights in it by express grant, or by presumption, or usage." (Shively *v.* Bowlby, 152 U. S. 13.)

From what has been already mentioned, as well as from the citations now about to be made, the supposed title of the English crown must have been largely extinguished, in point of fact, by grant, prescription, or usage, and, at the

time of our separation from the mother country, most of the riparian privileges on the tidal waters of that kingdom, must have been found vested in other than royal lands.

"It is admitted," observes Lord Hale, in his treatise *de Jure Maris*, "that *de jure communi*, between the high-water and low-water mark doth *prima facie* belong to the king. * * * Although it is true that such shore may be, and *commonly is*, part of the manor adjacent, and so may be belonging to a subject." (Pt. 1, ch. 4; 1 Harg. L. T. p. 13.)

So, either "by the king's charter," or "by *custom and usage*, or prescription," the subject may possess the property in the arms of the sea. (*Id.* ch. 5, pp. 17–18.)

And he may there "have *by usage* a several fishery" and "exclusive of the common liberty which otherwise, of common right, belongs to all the king's subjects." (*Id.* p. 19.)

Such an exclusive right was both "*claimed and found*," Lord *Mansfield* adjudged, in the instructive case of *Carter et al.* v. *Murcot*, 4 *Burr*, 2164.

"And although a subject cannot acquire the interest of the narrow seas, yet he may, by *usage* and *prescription*, acquire an interest in so much of the sea as he may reasonably possess, viz., of a *districtus maris*, a place in the sea between some parts or a particular part contiguous to the shore, or of a port or creek or arm of the sea, these may be possessed by a subject, and prescribed in point of interest both of the waters, and *the soil itself* covered with water, in such a precinct." (*De Jure Maris*, pt. 1, ch. 6; Harg. L. T. pp. 31–32.)

In like manner, a subject may, "by prescription and

usage, have a considerable precinct of a haven of the sea, as well in point of interest as jurisdiction." (*De Jure Maris*, pt. 2, ch. 5, p. 70.)

"And a direct grant from the crown of lands in a royal haven," says Mr. Justice *Baldwin*, "may be presumed on an uninterrupted possession of sixty years."

Mitchell et al. v. U. S., 9 *Pet.* 760.

See *U. S. Chaves*, 159 *U. S.* 463–464.

Enumerating, amongst other private emoluments "that happen by reason of this interest in the shore," those of *cranage, of wharfage, or keyage, of housellage, and pesage*, and observing that the rates of these duties are regulated and accrue to the owner by *agreement*, by *prescription*, or by *grant*, *Lord Hale* remarks, upon the first of these sources, as follows:

"A man for his own private advantage may, in a port town, set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, and pesage, for he does no more than is lawful for any man to do, viz., make the most of his own. And such are coal wharves, and wood wharves, and timber wharves, in the port of *London* and some other places."

Id., 1 Harg., L. T. p. 77.

"If A have the *ripa* or bank of the port, the king may not grant the liberty to unlade upon that bank or *ripa*, without his consent, unless custom has made the liberty thereto free to all, as in many places it is, for that would be a prejudice to the private interests of A, which may not be taken from him without such consent.

And, therefore, in the creation of a new port, either by proclamation or charter, it hath been the course to secure the interest of the shore beforehand for the building of

wharves and keys for the application of the merchandise and for the building of houses of receipt, as we see was done in the case of *Hull*."

De Jure Maris, Pt. 1, Ch. 6.
1 Harg., L. T. 73–74.

Again: "And many times it falls out that such a place within a port may be a great conveniency to make a common key or wharf, where the propriety of the soil may belong to a subject, whereby either his interest must be bought in by the lord of the port, or he must have those benefits that may arise by the taking or landing of merchandise." (*Id.* p. 76.)

THE RIGHTS OF THE RIPARIAN PROPRIETOR ARE DEFINED IN THE UNITED STATES BY THE LOCAL LAW.

There has never been in force a common law for the United States as a nation.

Whenever a common law right is asserted in a Federal tribunal "we must look to the State in which the controversy originated."

Wheaton *et al. v.* Peters *et al.*, 8 Pet. 658.
State of Penn. *v.* Wheeling Bridge Co., 13 How. 564.

The only legal principles which pervade the Union, as rules of decision, are such as are embodied in the Constitution, in treaties and in the acts of Congress.

In the several colonies the common law was adopted no further than was suitable to their respective conditions. As an entire system it prevailed, perhaps, nowhere in America.

"Our ancestors," said Mr. Justice *Story*, "brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation."

Van Ness v. *Pacard*, 2 Pet. 144.

"The common law, in all its diversities, has not been adopted," said Mr. Justice *McLean*, "by any one of the States. In some of them it has been modified by statutes, in others *by usage*. * * * We must ascertain the common law of each State, by its general policy, *the usages sanctioned by its courts*, and its statutes."

Wheeler v. *Smith et al.*, 9 How. 78.

"When the revolution took place the people of each State became themselves sovereign, and, in that character, held the absolute right to all their navigable waters and the soils under them, for their common use, subject only to the rights surrendered by the Constitution to the general Government."

Martin et al. v. *Waddell*, 16 Pet. 410.

"The shores of navigable waters and the soils under them were not granted by the Constitution to the United States, but were reserved to the States, respectively."

Pollard's Lessee *v.* Hagan *et al.*, 3 How. 230.
Goodtitle *v.* Kibbe, 9 *id.* 471.
Doe *v.* Beebe *et al.*, 13 *id.* 25.
Den *v.* Jersey Company, 15 *id.* 426.
County of St. Clair *v.* Lovingston, 23 Wall. 68.
Shively v. *Bowlby*, 152 U. S. 14-15.

They were so reserved to the State of Maryland.

Brown v. *Kennedy*, 5 H. & G. 195.
Smith v. *State of Maryland*, 18 How. 71, 74.

Such title being vested in the States, "a grant made by their authority must, therefore, manifestly be tried and determined by different principles from those which apply to

grants of the British crown when the title is held by a single individual in trust for the whole nation."

Martin et al. v. *Waddell*, 16 *Pet.* 410–411.

See, also, *Brooke* J., in *Stokes* v. *Upper Appomatox Company*, 3 *Leigh*, 388.

EARLY LIBERALITY TOWARDS SHORE PROPRIETORS MANIFESTED IN AMERICA.

The situation of the colonies was such as to require the removal of every restraint upon that commerce which was *intercourse* as well as traffic.

Gibbons v. *Ogden*, 9 *Wheat.* 189.

And to the interests of commerce, more, perhaps, than to any other influence, the Constitution owes its establishment.

2 *Story Consti.*, § 1057.

Brown v. *State of Maryland*, 12 *Wheat.* 446.

Cook v. *Pennsylvania*, 97 U. S. 574.

Most of the States were without resources to foster navigation by public expenditure, but many of them gave it encouragement by licensing a private appropriation of the shore unwarranted by the general order and presumption of the British law.

Shively v. *Bowlby*, 152 U. S. 18.

"The navigable streams of the country," says Mr. Justice Miller, "would be of little value" for the purposes of navigation "if they had no places where the vessels which they floated could land, with conveniences for receiving and discharging cargo, for laying by safely until this is done, and then departing in ease and security, in the further prosecution of their voyage. Wharves and piers are as necessary almost to the successful use of the stream in nav-

igation as the vessels themselves, and are to be considered as an important part of the instrumentalities of this branch of commerce. But to be of any value in this respect, they must reach so far into deep water as to enable the vessels used in ordinary navigation to float while they touch them and are lashed to their sides. They must, of necessity, occupy a part of the stream over which a vessel could float if they were not there."

AtLee v. *Packet Company*, 21 *Wall.* 393.
Transportation Co. v. *Parkersburg*, 107 U. S. 701.

Whether such concessions be regarded as establishing a *local common law* for the colonies or States in which they prevailed, or as originating in *grant or usage, consistent with the exceptions known in England*, the objects they were intended to accomplish must be considered the same.

"Wharves, quays, piers, and landing places, for the landing and unloading of vessels, were constructed in the navigable waters of the Atlantic States by riparian proprietors at a very early period in colonial times, and, in point of fact, the right to build such erections, subject to the limitations before mentioned, has been claimed and exercised by the owner of the adjacent land, from the first settlement of the country to the present time. (Ang. on Tide Wat., p. 196.)

"Our ancestors, when they immigrated here, undoubtedly brought the common law with them as part of their inheritance, but they soon found it indispensable, in order to secure these conveniences, to sanction the appropriation of the soil between high and low-water mark to the accomplishment of these objects. Different States adopted different regulations upon the subject, and, in some, the right of the riparian proprietor rests upon immemorial local usage."

Dutton et al. v. *Strong et al.*, 1 *Black*, 31, 32.

The whole subject was most carefully considered by Mr. Justice *Gray*, speaking for this Court, in *Shively* v. *Bowlby*, 152 U. S. 1.

THE LAW OF MARYLAND WAS IN HARMONY WITH THESE PRINCIPLES.

To the policy thus adopted at an early period in many of the American colonies, the States of Maryland and Virginia were not insensible.

"In Maryland, the owner of land bounded by tide water" was "authorized, according to various statutes beginning in 1745, to build wharves or other improvements upon the flats in front of his land, and to acquire a right in the land so improved."

Shively *v.* Bowlby, 152 U. S. 23–24.

"In Virginia, by virtue of statutes beginning in 1679, the owner of land bounded by tide waters" had the "title to ordinary low-water mark and the right to build wharves, provided they" did "not obstruct navigation." (*Id. ib.*)

By section 7 of the treaty* made between those commonwealths on the 28th of March 1785, it was provided, *inter alia*, as follows:

"The citizens of each State, respectively, shall have full property in the shores of the Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out

*The deliberations, at Mount Vernon, of the Commissioners by whom this compact was framed, resulted in the Annapolis Convention of 1786, and hence in the Convention which adopted the Constitution. (5 Marsh. Life Washington, 90–91; 2 Scharf's Md., 528–531, 536, 539; 1 McMaster's History, 277 *et seq.*)

wharves and other improvements, so as not to obstruct or injure the navigation of the river."

Act Md., 1785, ch. 1 (2 Kilty.)

Upon this treaty, it was remarked by Mr. Justice *Barbour*, that "the citizens, individually, of both commonwealths, were subject to all the obligations imposed, and entitled to all the benefits conferred, by that compact."

City of Georgetown v. *The Alexandria Canal Co.*, 12 *Pet.* 96.

But, as it was possible, that, at some future time this treaty might be abrogated, as between the contracting parties, or questioned for want of that Congressional consent* required by the Articles of Confederation, the section was confirmed, as between *the States and their citizens*, by enactment into law, in *Virginia*, by act of October, 1785, (12 Hen. Stat. 50,) and in *Maryland*, by act of March 12, 1786 (2 Kilty Stat.)

These statutes must be held to operate as legislative grants.

"That a grant may be made by law, as well as by patent pursuant to law is undoubted, (6 Cr. 128,) and a confirmation by a law is as fully and to all intents and purposes a grant as if it contained, in terms, a grant *de novo*."

Strother v. *Lucas*, 12 *Pet.* 454.

Ryan et al. v. *Carter et al.* 93 U. S. 82.

As the proprietor of the tract of land called "*Duddington Pasture*," (Rec. I, map next before p. 325; Rec. VI, *third* map before p. 399,) *Notley Young*, was thus vested

*Part of this compact formed a feature of the award rendered between these States by arbitrators, on January 16, 1877, (Rec. VII, 2124-2126,) and sanctioned, with reservation of national jurisdiction, by act Congress March 3, 1879. (20 Stat. 481.)

with "full property in the shores" of the Potomac adjoining that land, and with "privilege of making and carrying out wharves and other improvements."

Upon the division of this land between Notley Young and the Commissioners, on October 18, 1794,* it is agreed that square 472, and certain other squares, "*are to remain to* the said Notley Young," (Rec. III, 1046; IV, 2032; VI, 149–150,) and that squares 473 and 503, with certain other squares, "are to be subject to be sold, agreeably to the deeds of trust." (Rec. III, 1047; IV, 2033.)

Major L'Enfant. His Plan of the City, and Sales Thereunder.

The earliest plan of the city was that prepared in 1791, by Major L'Enfant, the first surveyor.

Its outlines, at least, appear to have been settled when, on April 12, 1791, the Commissioners and the original proprietors met the first President at Georgetown. (Rec. VI, 300.)

But, though as early as June 30, 1791, a public sale of lots, in the best situations, had been advertised to take place on the 17th of October following, (Rec. VII, 2192, 2203,) though, on August 19, 1791, the plan had been

*This division, as to squares 472, 473 and 503—the squares with which this brief is directly concerned—was not regarded as final in form.

By further and more particular division squares 473 and 503 fell to the public, the former, on October 28, 1800, (Rec. VI, 259–260; VII, 2148-2149,) and the latter, on March 24, 1797, (Rec. IV, 1410; VI, 24[illegible], 260-261; VII, 2149-2150,) and square 472 fell to the original proprietor, on January 12, 1796, (Rec. VI, 143, 242; IV, 1410; VII, 2147,) *or* January 12, 1797, (Rec. VI, 258,) the entry, in the proceedings of the Commissioners, of March 24, 1797, referring to this square, as "signed on 12th January last," and also as "signed on the 12th of January, 1796." (Rec. VI, 201–202; VII, 2244.)

presented by its author to the President, with certain alteration which the latter had directed, (Rec. VII, 2193, 2200,) it was not until September 9th, that the Commissioners had prescribed the title of the plan and the principle upon which the streets should receive either an alphabetical or a numerical description, and requested L'Enfant to have copies struck of the plan, (Rec. VII, 2202,) nor, until October 6, that the lots intended to be embraced in the sale had been ordered *to be laid off upon the ground.* (Rec. II, 655, 668.)

When the day appointed for the auction had arrived, the Commissioners, through the refusal of L'Enfant to produce his plan at the sale, could only exhibit certain plats of so much of that plan as was essential to indicate the eligible situation of some particular lots with reference to the President's house. (Rec. VII, 301 ; VII, 2204–2205.)

The inconsiderable sales effected in three days, (October 17–19, both inclusive,) in seven squares in that vicinity, required the vendue to be adjourned, until the L'Enfant plate might be expected to be seen in circulation, and the work of laying off the lots should be sufficiently complete to enable individuals to determine with certainty the locations of the property they might be disposed to purchase. (Rec. VII, 301–302.)

But the removal of L'Enfant by the President, early in March, 1792, defeated the publication of the plan and arrested the work then in progress under it. (Rec. VII, 302–303; Rec. VII, 2204–2205, 2208–2209 ; December 18, 1791, President to Commissioners, 12 Ford's Writ. 93 ; March, 1792, Mr. Jefferson to L'Enfant, 3 Jeff. Writ. 221, [Ed. 1854] ; March 2, 1792, President to David Stuart, 12 Ford's Writ. 104 ; March 6, 1792, Mr. Jefferson to Commissioners, 3 Jeff. Writ. 336 ; Rec. VII, 2209–2210, 2212.)

With the close of the official career of Major L'Enfant, ends, also, the connection of his plan with the city.

It had never, in fact, been finally adopted by the Executive.

The President, on October 25, 1791, had, indeed, informed Congress that a city had already been laid out agreeably to a plan which would be placed before them, (Rec. VI, 273, 302; VII, 2204,) and on December 13, 1791, had transmitted to them, accordingly, the plan of L'Enfant. (Rec. VI, 273, 302; VII, 2208.)

But the plan was merely tentative, (Rec. VII, 2273,) and had been so transmitted, it was afterwards declared by the first President, merely to exhibit the progress of affairs at the Federal city, and had been by him subsequently and intentionally withdrawn. (Rec. V, 81; VI, 228, 337; VII, 2274.)

A copy of this plan appears in Rec. VI, immediately after p. 352.*

Three observations may be made upon it.

1st. It exhibits a well-defined *street*, or equivalent thereof, bounding the city along the whole of the Potomac front of Notley Young's land, down to the commencement of the point, the present site of the Arsenal grounds.

2d. Notwithstanding this street, *a regular series of wharves* is projected from the water side thereof, opposite the six squares ranging from southeast of the area marked C, (designed for the location of a "Naval Itinerary Column,") down to the commencement of the point already mentioned.†

* The plan does not bear the title prescribed by the Commissioners on September 9, 1791, (Rec. VII, 2202,) and it fails to designate the streets by name, number, or letter.

† These two observations, with some extension of their terms, may be made also in relation to the Eastern Branch.

3. It will be seen hereafter that the reservation shown at this point was taken from the land of Notley Young; that it was designed for a *fort;* that it embraced upwards of 80 acres, and that the square nearest the Potomac and, at the same time, most immediately north of that reservation, corresponded, substantially, with what was afterwards designated upon the engraved plan as well as upon the Washington map of 1797, and with what still remains, square 506.

The location of the square subsequently numbered as 506 being thus fixed on the L'Enfant plan, it is only necessary to compare that plan with the engraved plan, (Rec. I, plat immediately after p. 324; Rec. V, plat immediately before p. 77; Rec. V, plat immediately after p. 120,) and with the Washington map of 1797, (Rec. V, plat immediately after p. 118,) to perceive that the five squares which, on the L'Enfant plan, lie nearest the river, and, at the same time, nearest the square on that plan situate immediately north of the reservation at the point, correspond, in location, substantially, with squares 505, 504, 503, 473, and 472, as shown upon the Washington map of 1797, and as shown, also, upon the engraved plan, except that upon the engraved plan a square (afterwards abolished) is interposed between square 503 and the street or open space on the river opposite that square, just as, on that plan, square 301, (afterwards abolished, Rec. II, 643, 1545–1546,) was interposed between square 300 and such street.

As these results do not depend upon argument, as they are *oculis subjecta fidelibus*, it may be affirmed that the wharves on the Potomac, exhibited by the plan of L'Enfant, were substantially located opposite six squares, of which three* are specially represented in the present brief.

* In the note, on the plan of L'Enfant, underwritten the *point*, it is explained, in effect, that the wharves marked on that plan have been located

And, indeed, as will be noticed in another connection, wharves, as existing structures, appear opposite two of such three squares, on the Washington map of 1797.

Major Andrew Ellicott. His Engraved Plan and Sales Thereunder, in 1792.

Major Andrew Ellicott, "Geographer-General" to the Commissioners, (Rec. VI, 158,) and acting surveyor during the absence of *L'Enfant* from the city, (Rec. VI, 301,) had, upon the dismissal of the latter, been employed to prepare a new plan of the city from materials then in his possession, and from such information as he had acquired, while thus acting as surveyor. (Rec. V, 80; VI, 229, 303.)

Proceeding to Philadelphia and there denied, by its author, the use of the L'Enfant plan, Ellicott, with the assistance of one of his brothers, contrived to complete his new plan, and to lay it before the President on February 20, [*sc.* Monday,] 1792.

See his letter February 23, [*sc.* Thursday,] 1792. (Rec. II, 663; V, 77; VII, 2208.)

The surveys of the squares had not then been returned. (Rec. VI, 211; *id.* 215, 229.)

The deviations from the plan of L'Enfant, introduced by Major Ellicott, were very numerous and material. (Rec. V, 80; VI, 303; VII, 2217, 2218, *passim.*)

The plan thus prepared by Major Ellicott was ready for

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where *the water is deepest*, and from the Philadelphia Plate, prepared in 1792, it appears that from square 506 to square 472, both inclusive, the water was from 21 feet to 12 feet deep.

the engraver by March 14, 1792. (Rec. V, 78, 79; VI, 303.)

It was engraved at *Boston* by *Sam. Hill*, and at *Philadelphia* by *Thackara & Vallance*. (Rec. II, 656.)

From this circumstance, the plan of Ellicott, designated in general as the "*Engraved Plan*," became more particularly distinguished as the "*Boston Plate*," or the "*Philadelphia Plate*," as reference was intended to the one or the other. (Rec. II, 656.)

A copy of the "*Boston Plate*" appears in Rec. V, immediately after p. 120.

Copies of the "*Philadelphia Plate*" appear in Rec. I, immediately after p. 324, and in Rec. V, immediately before p. 77.*

To avoid the recurrence of such consequences as had attended the sales made in October, 1791, the Commissioners, though they had at first fixed on a date not later than the month of June, 1792, determined to postpone public sales under the Ellicott plan, until the 8th of October, by which time, as was expected, that plan would be engraved, and considerable progress effected in the work of laying off the squares. (VI, 301–302, 303, 305.)

On October 8, (*sc.* Monday,) 1792, there was a second public sale of lots, (Rec. II, 656; VI, 274,) and the sale was continued on October 10, (*sc.* Wednesday,) 1792. (Rec. VI, 158.)

The Commissioners, five days before, had been notified, indeed, by Major Ellicott, that about 100 squares "were prepared and ready for division." (Rec. II, 668.)

*These plates entitle the maps they exhibit, and also designate the streets, as required by the directions given to L'Enfant by the Commissioners, on September 9, 1791. (Rec. VII, 2202.)

A few copies of the "*Boston Plate*" had reached the Commissioners on October 5, 1792, and that plate alone was exhibited at the sales last mentioned. (Rec. II, 656; VI, 303.)

Under the general authority conferred upon them by the President, on September 29, 1792, (Rec. VI, 274; VII, 2217,) to make private sales, at such prices and on such terms as they might think proper, the Commissioners, before November 6, 1792, had effected private sales of fifteen lots. (Rec. II, 656).

Of the "Philadelphia Plate," a proof has been furnished by the publishers to Mr. Jefferson, on October 11, 1792, (Rec. V, 79–80; VII, 2217–2218,) but it was not until the 13th of the following month, that any copy of that plate had been transmitted to the City of Washington. (Rec. VI, 159, 303.)

When the Ellicott plan was placed in the hands of the engravers, the city had not been actually surveyed.

The only squares then fully surveyed were nine in number, lying northeast of the President's house. (Rec. VI, 211.)

Thirty squares, the highest in number being 225 and the lowest 73, situated west, northwest, southeast, and east of the President's house, were then, "in a measure bounded, and a small ditch cut around them," "but there was no document whereby the dimensions were known." (Rec. VI, 211.)

These were not surveyed before the summer of 1792. (*Id. ib.*)

And there were no returns of any squares whatsoever, until after April 10, 1793. (*Id. ib.*, Rec. VI, 215.)

As early as November 25, 1791, *soundings* had been taken, as well in the Eastern Branch as, from the mouth thereof, along the Potomac, in front of the city. (Rec. VII, 2207.)

On July 11, 1792, Mr. Jefferson notices the absence of *soundings* upon the proof sheet of the *Boston Plate*, (Rec. VII, 2214,) and two days after, the Commissioners promise to send the soundings to Boston, for perfecting the plate at that city, as soon as the plan upon which the soundings were being added by Ellicott, at Philadelphia, could be obtained. (Rec. VII, 2215.)

But the Boston Plate was never so perfected. (Rec. II, 657. See the Plate, Rec. V, immediately after p. 120.)

Though the appearance of the *Philadelphia Plate* was delayed, the Commissioners, on August 30, 1792, express the wish that as the Boston Plate was without soundings, and hence "deficient in a very interesting point," only so many copies thereof be struck "as may take up the press, till the Philadelphia Plate is ready." (Rec. VII, 2216.)

Of the *Boston Plate*, 3,000 copies were struck, and many of them distributed, by October 28, 1792. (Rec. VII, 2218–2219.)

On the other hand, upon the *Philadelphia Plate* are exhibited the soundings taken in the Eastern Branch, and also in the Potomac in front of the city.

Opposite the land of Notley Young the soundings ranged from eleven feet opposite square 270 to twenty-one feet opposite square 506.*

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* The indistinctness of the figures upon the copies of the *Philadelphia Plate* contained in the record, having disabled counsel from determining those figures with sufficient certainty, even with the aid of a glass, resort has been had to a more legible impression, now in the possession of

In his letter to the President, September 25, 1803, (Rec. VI, 297,) it is observed by Nicholas King, then surveyor of the city, "that all the plans exhibit a street in front of the building squares, beyond which wharves only are allowed. In the plan engraved at Boston this line of the street is shown, but the extent of the building squares between it and the bank of the river are left open for decision as the laying off of the city progressed. In the Philadelphia Plate the plan is perfected to the channel and those squares defined." (Rec. VI, 306; Burch Dig. 359.)

There is disclosed also upon the *Philadelphia Plate*, though omitted from the *Boston Plate*, a regular *series of wharves* on the water side of the streets bounding the city along the Potomac and the Eastern Branch.

The absence of *wharves* on the Boston Plate was but a corollary from the omission on that Plate of *the soundings*, since prospective purchasers could be little allured by wharves erected in waters which, so far from being "navigable from the sea by vessels of *ten or more tons burthen*," (1 Stat. 77,) might prove incapable of floating a periagua, or sprit-sail scow.

From its superior size, finish, and, as was supposed, correctness, the "Philadelphia Plate" was greatly preferred by individuals, as well for their private convenience as for transmission abroad, and was generally used by the Commissioners after the sales made in October, 1792. (Rec. II, 656, 657, 675; VII, 2219, 2220.)

A copy of the engraved plan was transmitted by the

counsel, struck from that original copper plate which passed from the State Department to the Commissioners, and thereafter to the Commissioner of Public Buildings, (Rec. V, 84–86,) and, finally, to the United States Coast and Geodetic Survey Office, where it remains. (Rec. V, 76.)

President on April 22, 1793, to the Earl of Buchan, (10 Sparks' Writ. 338,) to whom, the year before, he had sent, on request, his portrait, (*id.* 229,) and from whom, in 1791, he had received the famous *box*, (*id.* 229–230,) recommitted to the donor, in the will of the recipient. (1 *id.* 575.)

"The publication of the engraved plans was considered by the Executive as 'giving the final and regulating stamp to the city of Washington,' defining the limits of property and exhibiting the advantages and choice of situations to those who, by purchase or otherwise, should become interested in the future metropolis of the Union.

"It was circulated by the Commissioners in the United States as the plan of the city; it was forwarded to most nations of Europe from the office of State, and through the agents of the United States. In the sales made by the Commissioners, in their negotiations for loans for the purpose of carrying on the public buildings, this plan was exhibited and referred to, and the advantageous disposition of the streets, the appropriations for the United States and for the city *were held forth as inducements to purchasers*, and examples of its superiority over other cities in the United States, as regarding the convenience and health of the citizens, or the beauty and ornament of the place." (Burch. Dig. 358; Rec. VI, 304–305, 399.)

This was the only authoritative plan of the city from 1792 down to the adoption of the *Washington Map* of 1797.*

But, made without actual survey, the plan of Ellicott was, of necessity, inaccurate and fallacious when actually applied to the ground.

"That plan," observe the Commissioners to the President, on February 27, 1797, "required the doing of many

* As late as October Term, 1885, the authority of the *engraved plan*, though the question turned upon no manner of distinction in *maps*, was strongly asserted by four members of this Court.

Patch v. White, 117 U. S. 221–222.

acts to carry it into effect, such as the laying out and bounding a *water street* on the waters which surround the city, and laying out squares where vacant spaces unappropriated were left in several parts of the city." (Rec. VI, 199, 290; IV, 1552; VII, 2242.)

It was "found, on actual survey, that the engraved plan was, in many respects, inaccurate, and that the actual situation of many streets and squares differed so essentially from the situation which they seemed to possess on the face of that plan, that, though they appeared on paper to lie some distance from the water, they were found to be situated in the Potomac." (Rec. VI, 296, 334; see Rec. IV, 1545–1546.)

The departures from the engraved plan, which received the approval of the President, though very numerous in the aggregate, (Rec. VI, 305), were justified, in his opinion, by considerations of justice, necessity, or public convenience.*

* Major Ellicott had been dismissed from their service, by the Commissioners, on March 12, 1793, (Rec. VII, 2221,) but, through the letter addressed by the President from Mount Vernon to the Commissioners, on April 3, 1793, (Rec. VII, 2222, 2223,) the difference between Major Ellicott and themselves appeared, for the moment, so completely adjusted, that six days afterwards they had elected him principal of the surveying department. (Rec. VI, 276.)

He was not destined, however, to continue for any considerable period in active responsibility.

He abandoned the surveying department and the city on July 19, 1793, when, in his stead, were appointed Mr. Briggs and Benjamin Ellicott, and afterwards Joseph Ellicott, (Rec. VI, 277,) Benjamin and Joseph being brothers of Andrew. (Rec. VII, 2227.)

Andrew Ellicott did not return to the city until November, (Rec. VII, 2227,) or December, (Rec. VI, 161,) 1793.

On the 9th of the latter month, he offered to resume the duties of surveyor, (Rec. IV, 1591–1592,) but the Commissioners, on December 17, 1793, declined his further services. (Rec. VI, 277, 161; Rec. VII, 2227.)

Apprehensions of the President, in 1792, for the Affairs of the City, in the Year Next to Come.

The anxieties of the first President, in respect to the Federal city, he had made known, as we have seen, to Dr. David Stuart, on March 2, 1792.

Four days afterwards he had addressed the Commissioners as follows:

"As Mr. Jefferson has, in his letter, mentioned the particular objects to which your attention will probably be turned, I shall only observe here that I am impressed in the strongest manner with the necessity there is of carrying on this business with as much vigor as the nature of the thing will admit. It has been observed by intelligent and well informed men, (not, however, of the class most friendly to the measure,) that the whole success of the Federal city depends upon the exertions which may be made in the ensuing season towards completing the object, for such is now the state of the public mind on this subject that it appears as if it were in an equilibrium, and will preponderate either for or against the measure as the progress of the thing may be. And there are not wanting those who, being interested in arresting the business, will leave no means unassayed to injure it."

Rec. VII, 2210.

On December 18, 1792, in a letter already quoted in part, he again expresses his anxieties to the Commissioners.

"No means, therefore, in my opinion, should be left unassayed to facilitate the operations of next year. Everything, in a manner, depends upon the celerity with which the public buildings are then carried on; sale of lots, private buildings, good or evil reports, all, all will be regulated thereby."

* * * * * * *

"Upon the whole, it will readily be perceived in what a serious light I consider delay in the progress of the public buildings, and how anxious I am to have them pushed forward. In a word, the next is the year that will give the tone to the city; if marked with energy, individuals will be inspirited, the sales will be enhanced, confidence diffused, and emulation created. Without it, I should not be surprised to find the lots unsalable and everything at a stand."

12 Sparks' Writings, 305, 307-308; 12 Ford's Writing, 215.

INCONSIDERABLE SALES EFFECTED BY THE END OF 1792.

The year 1792 had drawn to its close.

There had been effected the public sales of October 17, 18, and 19, 1791, and of October 8 and 10, 1792, the private sales of fifteen lots reported by the Commissioners on November 5, 1792, (Rec. II, 656,) and, perhaps, some few additional sales in private.

The exact extent of the fund received by the Commissioners from these sales, and from those conducted on September 15, 1793, (Rec. II, 657,) if ascertainable at all, cannot be determined from the present record.

Though, as indicated by his letter of August 13, 1793, the first Commissioners had requested of the President that he might cause the accounts of their receipts and expenditures of public money to be examined, (Rec. IV, 1582,) these Commissioners do not appear to have rendered any regular account during their continuance in office, and the earliest account of receipts, submitted to Congress by their successors, seems to have been submitted in January, 1796, and to have embraced, without distinction of years and with but little of detail, the accumulated transactions of all who had theretofore acted as Commissioners.

1 Am. St. Pap. (Miscel.) 143-144, 245-246.*

* By section 4 of act Congress, May 6, 1796, (1 Stat. 461; Davis' Laws,

But prior to the sales effected on December 23, 1793, in a transaction shortly to be noticed, there were none, it has been justly observed by the Commissioners, "deserving attention."

Rec. VI, 328; 1 Am. St. Pap. (Misc.) 220. See, also, 2 Scharf's Md. 570.

For, exclusive of the property embraced in that transaction, the Commissioners, as late as January 8, 1796, had sold, in the aggregate, but upwards of 200 lots, "together with a small number of water lots," (1 Am. St. Pap. (Misc.) 136,) and upon a collective consideration of $96,652, (*id. ib.*,) or $95,652, (*id.* 133–134.)

Our Unpromising Relations in 1793 with Foreign Nations and with the Indian Tribes.

The second term of the first President had commenced on March 4, 1793, and with a cabinet not completely harmonious upon questions of grave national importance.

118; Burch's Dig. 228,) the Commissioners were required to render semi-annually to the Secretary of the Treasury, "a particular account of all monies entrusted to them, and also the (*sic*) progress and state of the business and of the funds under their administration," and these accounts the Secretary was directed to lay before Congress.

The act Congress, May 1, 1802, sections 1 and 3, (2 Stat. 175, 176,) abolished the offices of Commissioners, and required them to "forthwith" settle with the accounting officers of the Treasury their accounts for all monies received and expended by them in their capacity as Commissioners, "and immediately thereafter" to pay to the superintendent created by the act "any balance which" might "be found against them on such settlement."

The report in 1801 of a Committee, H. R., had resulted in this enactment, the report representing, in effect, that it was understood by the Committee that the Commissioners, though they had expended more than a million of dollars, had never subjected their accounts to regular audit by any public officer, but their accounts had rested on their own statements.

1 Am. State Pap. (Miscel.) 243.

The third Congress assembled on the 2d of December following, at Philadelphia, then still in mourning from the frightful ravages of yellow fever. (2 Dall. 480, note.)

Strife seemed to threaten the country from every direction.

Spain had practically closed the Mississippi, and inflamed the Creeks and Cherokees, against us.

France, not yet emerged from intestine horrors, had declared war against England.

"And by the great proportion of the American people, it was deemed almost criminal to remain unconcerned spectators of a conflict between their ancient enemy and republican France."

5 Marsh. Life Wash. 401.

The British, moreover, still held our posts on the south of the lakes, and tampered with the neighboring savages—prohibited, through orders in council, the transportation of our food products to France, captured and condemned our shipping engaged in such transportation, and impressed our seamen when afloat upon the high seas in American vessels.

Presuming upon the partiality for France, and the resentment towards England manifested in the United States, citizen Genet, despite the proclamation of neutrality issued by the President on April 22, 1793, (11 Stat. 753,) had armed cruisers, and issued commissions to Americans, to destroy the commerce of nations with which we were at peace; had directed and effected captures within our littoral waters; established prize tribunals, within our territory, in the persons of French consuls resident therein; and after defying and insulting the government to which he was accredited, had finally demanded that the Chief

Justice of this Court should be prosecuted by the Attorney-General for criminal libel against France and her minister.

The speech of the first President to Congress, on December 3, 1793, though pervaded by the calmness and tranquility habitual in the expressions of its author, was scarcely such as to inspire satisfaction with a situation which, in some of its features, he might possibly prefer to intimate, rather than to discuss without reserve.

Adverting to the war abroad, and to the apprehensions arising therefrom, which had occasioned his proclamation of neutrality, he presses upon Congress the importance of enlarging the military establishment and of improving the organization of the militia.

He points out, how "extremely interesting" had become our "connection" with Europe—the insufficiency of the force arrayed against the Indians north of the Ohio—"the critical condition" of our relations with the Creeks and the Cherokees, and the probable necessity for increasing the revenue.

12 Sparks' Writ. 36–42.

Contract, December 24, 1793, of Morris and Greenleaf with the Commissioners.

On September 23, 1793, James Greenleaf, of New York, had entered into an agreement with the Commissioners for the purchase of 3,000 lots, at the rate of £25, or $66.66⅔, per lot. (Rec. VI, 144.)

But, on December 24, 1793, this agreement was superseded through another, whereby Mr. Greenleaf, together with Robert Morris, of Philadelphia, "the financier of the

Revolution," and now a Senator in Congress, contracted with the Commissioners for the purchase of 6,000 lots, at the rate of £30, or $80, per lot, of an average area of 5,265 square feet, (including alleys,) the whole to contain 31,590,000 square feet, (Rec. VI, 144-148,) or upwards of 725 acres, being 325 acres in excess of the contents of that part of "Duddington Pasture" owned by Notley Young.

See Plat, Rec. I, immediately before p. 325; Rec. VI, third plat next before p. 399.

COMMISSIONERS ENCOURAGED BY THEIR CONTRACT WITH MORRIS AND GREENLEAF.

Their satisfaction in accomplishing this agreement the Commissioners did not affect to conceal.

On December 23, 1793, the day preceding that on which the instrument bears date, they thus address the President:

"You will receive enclosed, a copy of an agreement we have entered into with Messrs. Morris and Greenleaf for the sale of 3,000 lots farther at £35 a lot, somewhat modifying the old, and stating the whole in this new contract. A consideration of the *uncertainty of settled times and an unembarrassed commerce* weighed much with us as well as Mr. Morris' capital, influence, and activity. The statement of funds enclosed may enable the prosecution of the work *even in a war*, in which event *we should without this contract have been almost still*." (Rec. VI, 160.)

And, on January 7, 1795, in a letter to Daniel Carroll, then still one of the Commissioners, the first President observes, in reference to this transaction, that he had consented to the low prices which had been proposed by Greenleaf, "because matters at that time seemed to be in a stagnant state and something was necessary to put the whole in motion again."

13 Ford's Writ. 24.

See Life of Robert Morris, (Sumner,) 144–145.

Provisions of the Contract Between the Commissioners and Morris and Greenleaf.

Under the agreement of December 24, 1793, the purchase money, amounting to $480,000, was payable in seven equal annual installments, (without interest,) commencing the 1st of May, 1794.

Morris and Greenleaf were to build twenty brick houses, annually, two stories high, covering twelve hundred square feet each, and were to sell no lots, previous to the 1st of January, 1796, but on condition that their vendees should erect, on every third lot, one such house, within four years from the date of sale.

This contract was afterwards modified by an agreement of the 24th of April, 1794, by which the payment of $80,000 and the erection of the first-mentioned houses, were to rest on the joint bond of Morris, Greenleaf, and one *John Nicholson*, and for the public lots, estimated to be about one thousand, in the land of Notley Young, Morris and Greenleaf were to receive a certificate.

Rec. VI, 160, 328; 1 Am. St. Pap. (Misc.) 220, 224.*

The agreement further provides:

"That the said Commissioners *have sold and contracted for the sale and conveyance, and do hereby*, for themselves and their successors, * * * *sell and contract for the sale and conveyance to* the said Robert Morris and James Greenleaf, as tenants in common, and their heirs, in fee simple," of 6,000 lots in the city of Washington, 4,500 to

* The provisions of the contract of December 24, 1793, in respect to *buildings*, are often mentioned by the Commissioners as affording substantial inducements to the contract on the part of the public.

Rec. VI, 161, 329; 1 Am. St. Pap. (Misc.) 133, 221.

And see *Post*, pp. .

lie southwest and 1,500 northeast of Massachusetts avenue, and that of said 4,500 lots, the said Morris and Greenleaf "*shall have the part of the city in Notley Young's land.*"

Rec. VI, 145; 1 Am. St. Pap. (Misc.) 223.

From the selection of "*water lots*" in general, Morris and Greenleaf are, by this contract, expressly excluded: "Provided, however, and it is hereby agreed by and between the parties to these presents, that the said Robert Morris and James Greenleaf *are entitled to the lots in Notley Young's land, and* OF COURSE TO THE PRIVILEGE OF WHARFING ANNEXED THERETO, and that lots adjoining the *canal* are not reckoned water lots."

Rec. VI, 146; 1 Am. St. Pap. (Misc.) 223.

"And it is further agreed by and between the parties aforesaid, that, in the division that is hereafter to be made between the said Commissioners and the present proprietors of the property in the said city of Washington, due regard shall be had by the said Commissioners, that such division shall take place, as far as consistently may be, for the interest of the said Robert Morris and James Greenleaf."

Rec. VI, 148; 1 Am. St. Pap. (Misc.) 224.

Thus, in the most valuable of such lots as might fall on division to the public, and in advance of such division, Morris and Greenleaf had secured the right of selection.

As the enterprise of these gentlemen was conducted with views avowedly free from merely disinterested considerations, they were careful to secure the share (not then ascertained by particular lots) of the public in the eligible possessions of Notley Young, *with, of course, the privilege of wharfing annexed thereto*, and the Commissioners were required, in their subsequent partition with Mr. Young, to manifest towards the interest of their vendees all the regard that circumstances might justly and conveniently permit.

The Agreement of December 24, 1793, Operated as a Sale on that Date.

Of the lots in the land of Notley Young which should fall to the public, this was a sale *in præsenti*.

When such lots became ascertained and identified by division between the Commissioners and the original proprietor, they became subject to the terms of the agreement by relation back to its date, as effectively as if by numbers originally described in that instrument.

Leavenworth, &c., R.R. Co. *v.* U. S., 92 U. S. 741.
French *v.* Fyan *et al.*, 93 *id.* 170.
Mo., &c., Ry. Co. *v.* Kan. Pac. Ry. Co., 97 *id.* 496.
Railroad Co. *v.* Baldwin, 103 *id.* 429.
Desoret Salt Company *v.* Tarpey, 142 *id.* 248–250.

No Square Carved from the Land of Notley Young was Situate on Rock Creek or on the Eastern Branch.

This Court, in 109 U. S. 691–692, referring to the 857 lots in the land of Notley Young, embraced in the certificate granted to Greenleaf, on October 18, 1794, observe, "and it may be that many of them were water lots, but which of them were is to be determined by the actual facts as to each and not by any general description. *There were lots in Notley Young's land as laid out which answered the description, without reference to those lying on the north side of Water street.*"

That portion of the quotation which is marked in italics

is not, however, it is submitted, consonant to what is revealed by the record in the present controversy.

Notley Young owned no land in the vicinity of *Rock Creek*, and but a small segment, if any, of his estate, can be said, with any degree of propriety, to have been bounded, originally and before division, by the *Eastern Branch*—the segment situate east of the lower portion of the *point* and forming the southern terminus of his estate.

> Rec. VI, third plat from end; Rec. VII, plat immediately before p. 2495; *cf.* Rec. I, plat immediately before p. 325.

But the whole of this point, embracing upwards of 80 acres, (Rec. VI, 275,) and including the segment in question, had been dedicated to the public on the plan of L'Enfant, (Rec. VI, plat facing p. 352,) and on the Philadelphia Plate, (Rec. I, plat next after p. 324; Rec. V, plat next before p. 77,) as well as on the Boston Plate, (Rec. V, plat immediately after p. 120,) it continued to remain a Government reservation, with no square north of it, immediately towards the Potomac, of a higher number than square 506.

On January 30, 1793, Mr. Young had objected to so extensive an appropriation of his property for a fort, the object, it appears, of the appropriation, (Rec. VI, 274–275,) and the first President having thereafter directed the retention by the public of such portion only of the point as might sufficiently answer the purposes for which that locality had been originally reserved to the public, the Commissioners, on April 3, 1793, made order that one-half of the point be laid off into squares. (Rec. VI, 276; VII, 2222.)*

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* The Commissioners directed, at the same time, that there be laid off into squares the *triangle* on the Potomac, in the land of Mr. Young, on the plan of L'Enfant, (Rec. VI, plat facing p. 352,) marked *C*, and

It will be seen from the Washington map of 1797, (Rec. V, facing p. 118,) that the *lower* portion of the point was that which continued to be reserved to the Government, and that, upon the division into squares of the *upper* portion, there were introduced into the plan of the city, towards the water, squares S. of 506 and S. of S. of 506, (Rec. VI, 213, 231; 1 Am. Stat. Pap. [Misc.] 334,) neither of them situate in the immediate vicinity of the Eastern Branch.

The former square was bounded towards the water by Water street on December 24, 1793, (Rec. VI, 264–265; VII, 2153,) and the latter was bounded (*when* the record does not disclose, with precision,) in the same manner.

Both of these squares, together with squares 505 and 506 and certain squares to the east thereof, were restored to the reservation and thrown into the Arsenal grounds, through purchase by the Government, under act Congress March 3, 1857, (11 Stat. 202–203,) leaving, thereafter, on Water street, square 504 as the highest in number north of those grounds.

The square in the land of Notley Young which bears the highest number, is square W. of 606. (Rec. VI, 150.)

This square, though not designated by *figures* upon the Washington map of 1797, is there seen, without difficulty, to be that which lies east of a certain portion of square S. of S. 506.

There is, and was, no square of so low a number as 606, or W. of 606, situate in the immediate locality of the Eastern Branch.

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designed for a Naval Itinerary Column, and on the Philadelphia Plate, (Rec. I, plat next after p. 324,) as well as on the Boston Plate, (Rec. V, plat facing p. 120,) shown as an open space.

By reference to the Washington map of 1797, (Rec. V, facing p. 118,) it will be observed that one of the squares carved, on such division, from this *triangle*, was square S. 415, which is bounded towards the river by Water street. (Rec. III, 1030.)

There being no squares in the land of Notley Young which were in proximity either to Rock Creek or to the Eastern Branch, the squares, if any, in that land, which were entitled to the privileges of wharfing, must be found in the vicinity of the Potomac.

Of the Returns, Divisions, Certificates of Divisions and Registers of Squares.

As frequent reference will hereafter become necessary to the course pursued by the surveyors and the Commissioners, in the ascertainment, division and registration of squares, some previous explanation of that course may be attended with convenience.

The surveyor was required to return to the Commissioners his survey, (with its date,) of each square, defining its boundaries by streets (or other necessary description,) and also in feet and inches. (Rec. II, 669–670; IV, 1574–1575; VI, 178–179.)

The survey thus transmitted to the Commissioners, though accompanied by no plat of the square to which it related, was known as the *return* of that square. (See illustrations, Rec. VII, 2138–2139.)

Thereafter, in most instances several years after, there was drawn, upon a detached sheet of paper, a plat of the square, exhibiting thereon by streets and also by figures, the boundaries of the square, in feet and inches.

Upon the same sheet, and immediately below the plat, those boundaries and the extent thereof were futher expressed in words, and imported to be taken from the *return*, the date of which and, in general, the name also of the surveyor making the return, were given.

Beneath all, was an agreement between and signed by the Commissioners and the original proprietor, bearing a

date certain and attested by witnesses, denoting whether the square should "*remain*" to the proprietor, *agreeably to his deed of trust*, or be subject to sale, agreeably to that deed, on public account.

See illustrations, Rec. VII, 2140–2142, 2147–2153.

These detached sheets, thus signed, were recorded and were known as "*Certificates of Divisions*, (Rec. IV, 1524,) more than 300 of which are now missing. (Rec. IV, 1499, 1707.)

The Certificates of Division were copied, each upon a distinct and separate page, into three volumes known as the "*Registers of Squares*." (Rec. IV, 1524.)*

The squares copied from the certificates, into the Registers of Squares, were there entered, as required by the Commissioners, (Rec. IV, 1575,) in regular numerical succession, commencing with square No. 1, (see Rec. IV, 1644,) but with little apparent reference to the dates of the returns, or to the dates either of the certificates, or of their record. (See Rec. III, 700, 793, 821–822, 829–831; VI, 254, 257, 258, 259–262, *et passim*.)

*These volumes, though rejected, in the opinion below, (Rec. VII, 2536–2538,) were constantly offered in evidence without objection from the appellee, (Rec. III, 685, 700, 792, 821, 1009, 1029, 1043; IV, 1411–1413; VI, 254–264,) and hence, in effect, *by consent*, under Rule 13 of this Court, and to these volumes the Government not only appealed in its exceptions to certain of the paper titles, (Rec. III, 858. 1113,) but as evidence, in other respects, in its favor, (Rec. IV, 1558,) expressly introducing the Registers in evidence, in relation to squares 233, (Rec. VII, 2140; III, 1009–1010,) S. 415, (Rec. VII, 2147; III, 1029–1030,) and W. 471; (Rec. VII, 2147; III, 1043–1044;) and, indeed, even in actions of *ejectment*, the Registers had always been here received as evidence. (Rec. IV, 1722; see, also, II, 667–668.)

But in respect to the eighteen squares in the land of Notley Young, which were situate nearest the Potomac, the independent proof furnished by the Government, (Rec. VII, 2140–2154,) would render recourse to the Registers wholly unnecessary.

To understand this discrepancy between numbers and events, may be found, perhaps, in the course of the brief, to repay some part of the attention which an investigation of details must now unavoidably exact.

A glance at such portion of the Registers as appear in the record, is sufficient to remove the conjecture that the compilation of the Registers might have been deferred until the whole or greater number of the squares in the city had been divided between the public and the original proprietors.

As the Registers of squares are constantly found to assign to a square having a lower number, a much later date of division, or of record, than they assign to one having a higher number, as the division, and the record of the division, of a square, were required, in general, to precede the appearance of the square in the Register; and as the squares entered in the Registers are found to be there inserted in regular numerical sequence, it would seem to be sufficiently apparent, that the numerical order in which the squares are entered in the Registers cannot always pursue the chronological order in which they were there inserted.

And the course which was actually pursued under the Commissioners may be illustrated *thus:*

Assuming the three volumes of Registers to contain 500 folios, each, every square between 1 and 500 would find its corresponding folio in vol. 1; each, between 500 and 1000, its potentially corresponding folio in vol. 2; and each, beyond 1000, such like folio, in vol. 3.*

* The Registers contain in point of fact—volume 1, from square 1 to square 558, both inclusive; volume 2, from square 559 to square 1129, both inclusive; and volume 3, from square 1132 to 1143, both inclusive, and, after square 1143, square S. of 990, noted as divided on the 10th of October, 1801.

If, (to invent examples,) when, from division and record, squares 28 and 30, 196 and 198, 446 and 448, became ready for entry in vol. 1 of the Registers, squares 29, 197, and 447 had not yet been divided, the squares thus ready for entry in that volume would be transcribed upon folios thereof corresponding in numbers with such squares, and the folios of that volume, corresponding in numbers with the three squares not then divided, would await the period when, through division and record, such three squares might be properly admitted into the Register.

And so in other cases, and as to other volumes of the Registers.

For the want of preliminaries deemed by the Commissioners essential to the entry of squares in the Registers, many squares are to be found omitted from the Registers, long after they must have there appeared, under any rule of mere numerical notation.

Thus, squares 4 and 8 were divided in 1792, (Rec. VI, 236–237,) and squares 1 and 9 in 1793. (Rec. VI, 235, 237.)

Square 708 was divided in 1794; (Rec. VI, 245;) squares 2, 10, 802 and 1080, (Rec. VI, 236, 238, 247, 253,) were divided in 1795; square 1067 was divided in 1796; (Rec. VI, 253;) and square 826 in 1797. (Rec. VI, 247.)

Again, square 22 was divided July 27, 1796, and recorded

The paging in these three volumes bears the uniform *water mark* of the year 1794.

These particulars do not appear in the printed record before the Court, but it is not deemed improper to mention them in the present brief, because of the stipulation that "the originals of any documents, books of account, or other evidence whatsoever, may be produced and referred to," in this Court, when desired by counsel on either side. (Rec. IV, 1519.)

And it is within the personal knowledge of counsel appearing on the present brief, that the originals of various volumes, (amongst them, the Registers of Squares,) and divers maps, were here produced and consulted, on the oral argument in 109 U. S. 672.

February 24, 1797, (Rec. III, 829, 830,) and square 129 was divided December 26, 1796, and recorded April 13, 1797, (Rec. III, 787–788.)

Squares 233, 472 and 505 were divided January 12, 1797, and recorded June 15, 1797, (Rec. III, 1009–1010; VI, 258 [201–202; VII, 2147, 2244,] VI, 262–263; VII, 2151,) and squares S.E. 267, 270, 471 and 506 were divided March 24, 1797, and recorded June 15, 1797. (Rec. VI, 254; VII, 2141; VI, 257; VI, 263–264; VII, 2152.)

Square E. of 1025 was divided in 1798, (Rec. VI, 253,) and square 883 in 1799. (Rec. VI, 248.)

Squares 148, 89 and 63 were divided in 1799, and recorded on January 3, 1800. (Rec. III, 685–686, 700–701, 792–794.)

Square 503 was divided March 24, 1797, but recorded May 27, 1800. (Rec. VI, 260–261; VII, 2149–2150; IV, 1410.)

And squares W. 471 and 473 were divided October 28, 1800, and recorded January 12, 1801. (Rec. III, 1043–1045; VI, 259–260; VII, 2148–2149.)

Though none of these 28 squares owe their appearance in the record to any preconceived purpose of counsel to employ them in the present connection, it is quite obvious that *all* of those squares were not so circumstanced as to *suffer them to be entered in the Register of Squares*, prior to the year 1797; that one of them was not so situated before 1798; another of them not before 1799; four of them not until 1800, and two of them not until 1801.

The entries of the squares into the Registers of Squares were rendered dependent upon so many conditions precedent, each of which might be greatly delayed in execution, from innumerable causes, that the completion of those entries, without the aid of miracle, in advance of the date fixed for the removal of the offices of Government to the banks of the Potomac, could scarcely be conceived.

Gantt, one of the trustees in the deeds of trust from the original proprietors, had been appointed clerk by the Commissioners to record the certificates of divisions and of sales, in conformity with the provisions of sections 7 and 9 of the act of Maryland of December 19, 1791.

To *Gantt*, on January 28, 1794, the Commissioners complain of the delay attending the record of such certificates, insisting that he shall proceed with their registration and "deliver the originals, as soon as recorded," to the Secretary of the Board. (Rec. VI, 1508.)

From the entries contained in the first volume of the *Registers of Squares*, (Rec. IV, 1411–1412), in relation to squares 270 and E. 267, it is shown that, though both of the squares were divided on March 24, 1797, and recorded on June 15, 1797, the former was recorded "*in square book No.* 1, *folio* 270," and the latter "*in square book No.* 4." (Rec. IV, 1411–1412; VII, 2140–2141.*)

Upon the production, on the oral argument, agreeably to stipulation, (Rec. IV, 1519,) of the originals of any of the certificates of division mentioned in the present record, and recorded when Mr. Gantt was clerk, it will be found that such originals are endorsed by or for him, with the dates at which, and the *numbers of the square books* in which, the certificates are recorded.

On September 12, 1797, Robert King had been appointed surveyor upon the resignation of his son Nicholas,† (Rec. IV,

*It might happen that the arrangement and contents of square book No. 1 were not such, on June 15, 1797, as to admit the convenient introduction into that volume of a square so irregular in number as that of E. 267, and that that square could then be most conveniently accommodated only in square book No. 4.

†*Ralston* had been assistant to surveyor *Freeman*, (Rec. IV, 1620,) as late, certainly, as May 17, 1796, (Rec. IV, 1622,) and, upon the re-

1528, 1632; VI, 202,) who, about October 1, 1796, (Rec. II, 636, 637; IV, 1527,) had consented to become surveyor until his father might come to Washington, (Rec. IV, 1603,) from England, (Rec. IV, 1528; VII, 2270.)

To Robert King, his youngest son, Robert, Jr., became assistant. (Rec. IV, 1668, 1669.)

As early as January 5, 1798, Robert King, senior, in a letter to the Commissioners, thus refers to Robert, junior:

"Also, as my youngest son is now returned home, and will be at liberty a few months, as the board seemed to wish I could employ some other hand *to assist in the registering the squares*, he will be ready to serve them in that business either by the day or by the square, as may appear to the board the most eligible, and will refer the wages to the board." (Rec. IV, 1604–1605.)

It seems probable, from this letter, that the work of registering the squares was then, from whatever cause, less advanced than was deemed by the Commissioners desirable.

And, from the communication next to be quoted, it may not unreasonably be conjectured, that Robert, junior, had been employed by the Commissioners, as suggested by Robert, senior.

From the surveyor's office, on October 18, 1799, (Rec. IV, 1605,) Robert King, Jr., writes the Commissioners as follows:

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tirement of Freeman, had found himself in charge of the surveying department, *Nicholas King*, by the middle of September, 1796, if not before, becoming his assistant. (Rec. IV, 1623.)

On September 21, (*sc. Wednesday.*) 1796. Nicholas King thus writes the Commissioners:

"As Mr. Ralston purposes leaving the office on the latter end of this week, or early in the next, it is necessary I should know your determination on the subject we conversed upon; for, without perfectly comprehending the manner in which the business of the surveying department has hitherto been carried on, and the state it is now in, it is impossible to take it up but under great disadvantage." (Rec. IV, 1623–1624.)

"I agree to register all the *remaining* squares at half a dollar per square, and commence this morning. The last finished is 805; all above which *and the omitted* squares are yet to enter." (Rec. IV, 1605.)

We have seen that in the land of Notley Young, squares W. 471 and 473 were not divided until October 18, 1800, nor was it until the same date that any division was made in such land, of squares S. 549, E. 546, 596, 597, E. 547, W. 604 and W. 606. (Rec. VI, 360, 361, 362, 363.)

As these squares were not qualified, therefore, for insertion in the Registers of Squares, so early as October 18, 1799, they must have been embraced in "the *omitted* squares" mentioned in the overture made on that date by Robert King, Jr.

In the land of Daniel Carroll, square 882 was not divided until August 7, 1800. (Rec. IV, 1678.)

In the land acquired by Morris, Nicholson and Prout, no division between themselves and the Commissioners was made of square 997, until June 16, 1800, (Rec. VI, 353,) nor any final division made as to squares 974, 995, 996 and 1024, until August 4, 1809. (Rec. IV, 1523, 1524, 1678; VI, 353.)

And in the land of David Burns, square 486 was not divided until July 17, 1829. (Rec. IV, 1676, 1677.)

Hence, this square also must have been embraced in "the omitted squares," mentioned in the above letter of Robert King, Jr.

Besides these *certificates of divisions* between the original proprietors and the Commissioners, the latter also issued to those to whom they made sales *certificates of purchase*, certifying the name of the purchaser, the number

of the square (*or* of the lot and also of its square,) bought, the payment of the whole consideration money, and the resulting title of the purchaser. (Rec. III, 1046; IV, 2034–2035; VI, 151–152.)

Such certificates of purchase were also granted by the *Superintendent*, (Rec. III, 693, 840,) who was the successor in office of the Commissioners.

Of the 18 Squares on Water Street, Carved from the Land of Notley Young.

The squares in the land of Notley Young, which were situate nearest the Potomac, were *eighteen* in number, and as follows:

Squares 233, E. 267, 270, 300, 329, 356, 390, 391, S. 415, W. 471, 472, 473, 503, 504, 505, 506, S. of 506, S. of S. 506.

When Such Squares were Returned and How Bounded.

Of those 18 squares in the land of Notley Young, which were situate nearest the Potomac, *six* had been returned by Andrew Ellicott, on June 15, 1793, to wit: Squares 472, 473, 505, 506, S. of 506, S. of S. of 506, designating *the extent* only of their *eastern* boundaries, (except in the case of square 472, the length of whose northern boundary, also, was defined, though an impossible western limit on 7th street was assigned to that square,) but describing the squares as bounded by *that river* towards the water. (Rec. VII, 2138–2139.)

At the same time, was returned square 504, admeasured, in lots, by feet, in all its outlines, and bounded by Water

street, according to its plat, but, according to the terms erroneously underwritten the plat, "on the west by an alley." (Rec. VI, 261–262; VII, 2150.)

Of these 18 squares there had also been returned on October 15, 1793, square 329, (Rec. VII, 2143,) and square 356, (Rec. VII, 2145,) each of them admeasured, in outlines, and bounded towards the river by Water street.

On December 14, 1793, *five* of the 18 squares were returned admeasured, by feet and inches, in all their outlines, and bounded towards the Potomac by Water street, to wit: Squares 233 (Rec. III, 1010,) E. 267 (Rec. VII, 2140,) 270 (Rec. IV, 1411; VII, 2141,) 300, (Rec. VI, 240; VII, 2142) and W. 471, (Rec. III, 1044.)

But on the 24th day of December, 1793, the date of the agreement made by the Commissioners with Morris and Greenleaf, the six squares,* returned, on June 15, 1793, as bounded towards the water by *the Potomac*, were returned as bounded towards the water by *Water street.*

Rec. VI, 143, 242–243, 258–260, 262–265; VII, 2147-2149, 2151–2154.

Of such 18 squares, square 503 was also returned, on December 24, 1793, with similar admeasurements, and with the same boundary towards the water.

Rec. VI, 243; VII, 2149.

* This, as to S. of S. 506, is assumed. The plat, (Rec. VII, 2154,) does not show when, if at all, the original return (Rec. VII, 2139,) was altered. And, upon the plat, taken from the sectional, or portfolio, map, made in 1803, by N. King, the western boundary of this square is represented as "Water street *or* Potomac river." Water street, however, is the boundary, in division book No. 1. (IV, 1540; VI, 314.)

Square S. of S. 506 had fallen on division, October 18, 1794, to Notley Young, (Rec. VI, 150,) who, on October 28, 1794, conveyed it, (Rec. IV, 1380,) together with square 506 and other squares, (Rec. IV, 1379,) and amongst them, it would seem, square S. of 506, (6 Peters, 310, 9 *id.* 292,) to James Greenleaf.

It is plain, therefore, that on or before the date of the agreement, fourteen at least, and most probably fifteen, of the eighteen squares in the land of Notley Young which were situate nearest the Potomac had been regularly returned, with outlines fully admeasured, and as bounded towards the river by Water street, to wit, squares 233, *E.* 267, 270, 300, 329, 356, *W.* 471, 472, 473, 503, 504, 505, 506, *S. of* 506, *S. of S of* 506.

Plats of the remaining three of these eighteen squares, to wit, squares 390 and 391, (Rec. VII, 2145, 2146; see VI, 241,) and *S.* 415, (Rec. III, 1030,) contain the outlines of the three squares, in feet, and exhibit each as bounded, towards the water, by Water street, and assigned to Notley Young, for his *improvements*. (Rec. VI, 2d plat from end.)

There is nothing in the plats, nor, it is believed, elsewhere in the record, to fix with precision the dates at which these squares were returned, but there exists no ground for presuming that they were returned subsequently to December 24, 1793, when, as we have seen, the returns of certain squares of higher numbers were corrected, to conform their boundaries, towards the water, with the street of that name.

Of the Probable Reasons for the Change Made on December 24, 1793, in the Boundary Towards the River, of the Six Squares Returned on June 15, 1793.

The returns made of six squares, on December 24, 1793, expressed, as we have seen, in feet and inches, each of the boundaries of the squares; whereas, in the returns made of

these squares, on June 15, 1793, only their eastern boundaries, (except as to square 472,) had been so expressed.

Yet the boundaries given, without distances, in the earlier returns of those squares, pursue the courses, and are entirely consistent with the measurements, assigned to these boundaries, in the later.

The admeasurements given, in the earlier returns, for the eastern boundaries of those squares* and for the northern boundary of square 472, are such also as are contained in the returns of December 24, 1793.

As early as April 9, 1793, the Commissioners had prescribed the form to be observed in the return of any square, and had required, in effect, that each boundary of the square should be specified and expressed *in feet.*

Rec. IV, 1574–1575; VI, 178–179.

Through the returns of December 24, 1793, those of June 15, 1793, were merely corrected to this requirement, except in the particular of substituting for the southwest boundary of the squares the description of *Water street* for that of *the Potomac.*

The substitution, in reality, was but nominal. It created no alteration in the actual location or topography of the boundary which, under the description of *Water street*, in the latter returns, remained identical with the *Potomac* mentioned in the earlier. For within the memory of living witnesses, the paper site of Water street was largely, if not wholly, situate in the Potomac.

The change made in the description of this boundary was adopted in view, perhaps, partly of the extensive cotemporaneous transaction with Morris and Greenleaf, partly for the sake of simplicity and uniformity of description, and

* There is an "æ," followed by mutilation, in the earlier return, as to the eastern boundary of square 473. (Rec. VII, 2138.)

mainly, it is supposed, to preserve that design in the engraved plan, (a design universal with cities situate on navigable waters,) which contemplated the establishment of a continuous street or open space along the river, answering the character of Water street. (Rec. IV, 1595; VI, 164, 281.)

It was stipulated in the agreement of December 24, 1793, that of the 6,000 lots therein mentioned, 4,500 were to lie southwest of Massachusetts avenue,* and that of these latter, Morris and Greenleaf should "have *the part of the city in Notley Young's land*," (Rec. VI, 145,) (exempting from selection, however, by those gentlemen, as part of their 4,500 lots, such of them as might fall within certain 132 designated squares,) "and the lots lying in Carrollsburg,† and, also, further excepting the *water-lots*, including the *water-lots* lying on the Eastern Branch, and also one-half of the lots lying in Hamburg,‡ the lots in that part of the city, and belonging to it, other than *water-lots*, being to be divided by alternate choice" between the Commissioners, on the one hand, and Morris and Greenleaf on the other: "Provided, however," it is declared, "that the said Robert Morris and James Greenleaf *are entitled to the lots in Notley Young's land, and, of course, to the privilege*

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*The course of this avenue at the date of the agreement, was, substantially, its course at the present time.

See Boston Plate, (Rec. V, immediately after p. 120,) and Philadelphia Plate, (Rec. V, immediately before p. 77; Rec. I, immediately after p. 324.

†Separated from part of the eastern boundary of Notley Young's land, by St. James' creek, and lying on that creek and on the Eastern Branch. (Rec. I, map immediately preceding p. 325; Rec. VII, map immediately preceding p. 2495.)

‡Situate on the Potomac between Goose (or Tyber) creek and Georgetown. (See maps last above.)

of wharfing annexed thereto, and that lots adjoining the canal* are not reckoned *water-lots*."† (Rec. VI, 146.)

Of the 18 squares in the land of Notley Young, which were situate nearest the Potomac, three had been returned as early as June 15, 1793, and five on December 14, 1793, as bounded towards the water by Water street.

Did the Commissioners (amongst whom was an associate justice of this court) understand that, in entering into the agreement of December 24, 1793, they were, as to these eight squares, merely shuffling with the best of their customers?—that whatever might be the privileges of wharfing conceded, *in terms*, by the contract, the undealt trump in the sleeve of the Government would be that no such privileges were at all admitted, *in law*, because they had been already destroyed by the intervention of Water street?

Of the 18 squares in that land, which were situate nearest the Potomac, six of them, (if we include square S. of S. 506,) though returned on June 15, 1793, as bounded by that river, were (together with square 503) returned on December 24, 1793, the date of the agreement itself, as bounded by Water street.

Was the alteration effected, cotemporaneously with the agreement, in so important a boundary for these six squares—was the return made of square 503—contrived by

* Shown on L'Enfant's plan. (Rec. VI, immediately after p. 352.)

† It is not, however, until July 12, 1794, that the surveyor, (then *Freeman*,) reports to the Commissioners that "*Water street on Potomac river is adjusted and bounded.*" (Rec. IV, 1595.)

But the adjustment and boundary thus reported must not be understood as designed to signify that accurate boundaries and dimensions for Water street had been laid down, in fact, *upon the ground or in the river*, (Rec. IV, 1750, 1751, 1621-1622,) in front of the land of Notley Young, with reference to the actual limits of squares in that land *previously marked off upon the ground*.

For this, if at all attempted, was never, with any pretension to fidelity, accomplished in the lifetime of Mr. Freeman.

the Commissioners, with the secret but unsuspected intention of obliterating the provisions in question of the contract, by enabling its deception to be extended with impartial uniformity to all squares in the land of Notley Young, fronting the Potomac?

No man can so suspect.

Hanc modestiam aequitatemque et altitudinem animi, ubi nunc in uno inveneris, quae tum populi universi fuit. (*Liv.* 4, 6.)

"This is a contract," said Mr. Chief Justice Marshall, "and although a State is a party, it ought to be construed according to those well established principles which regulate contracts in general.

"The State is in the situation of a person who holds forth to the world the conditions on which he is willing to sell his property.

"If he should couch his propositions in such ambiguous terms, that they might be understood differently, in consequence of which sales were to be made, and the purchase money paid, he would come with an ill grace into court, to insist on a latent and obscure meaning, which should give him back his property and permit him to retain the purchase money. All those principles of equity and of fair dealing, which constitute the basis of judicial proceedings, require that courts should lean against such a construction."

Huidekoper's Lessee *v.* Douglass, 3 Cranch, 70–71.

The nation that enters into contract with an individual, renounces its sovereignty as to the contract, and assumes the obligations of a moral agent.

Hamilton's Works, vol. 3, p. 11.

And, "the United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf."

U. S. *v.* Bostwick, 94 U. S. 66.
U. S. *v.* Smith, *id.* 217.
Smoot's Case, 15 Wall. 47.
Manufacturing Co. *v.* U. S. 17 *id.* 595.
Sinking Fund Cases, 99 U. S. 719.

This means merely that justice, being immutable, can know no distinction between individuals and sovereignties.

In pronouncing judgment of condemnation against neutral merchantmen of Sweden, resisting visitation and search, while sailing under convoy of a Swedish frigate, Sir William Scott, with the felicity and elevation common to so many of his utterances, said:

"In forming that judgment, I trust that it has not escaped my anxious recollection for one moment, what it is that the duty of my station calls for from me, namely, to consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out, without distinction to independent States, some happening to be neutral and some to be belligerent. The seat of judicial authority is, indeed, locally *here*, in the belligerent country, according to the known law and practice of nations; but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly, as he would determine the same question if sitting at *Stockholm*, to assert no pretensions on the part of *Great Britain* which he would not allow to *Sweden* in the same circumstances, and to impose no duties on *Sweden*, as a neutral country,

which he would not admit to belong to *Great Britain* in the same character."

The Maria, 1 Rob. 295–296. (Phila. Ed. 1800.)

PECULIAR LANGUAGE OF CONTRACT OF DECEMBER 24, 1793, EXPLAINED BY COTEMPORANEOUS TRANSACTION OF COMMISSIONERS WITH JOHN TEMPLEMAN.

It is proper to observe, that the language employed in the contract of December 24, 1793, is peculiar, and indicates a well-settled understanding in reference to the wharfing privilege.

The terms of the contract express a sale of the public's part of *Young's* land, "*and, of course, the privilege of wharfing annexed thereto,*" while, in the same instrument, direct terms of exclusion are used in reference to water property *in any other lands.*

The explanation of this phraseology is not difficult. It will be found in cotemporaneous transactions, in the light of which the contract was construed by the Commissioners.

On October 8, 1792, certain of the lots in square No. 8, lying east of Rock Creek, had fallen, on division, to the Government. Subsequently, and on July 16, 1793, there was returned for record by Mr. Ellicott, the surveyor, a survey of that square, whereby it was bounded "*on the west by 27th Street,*" 366 feet. (Rec. VI, 237.)

Opposite these lots, and between the street and the Potomac, lay a certain strip of ground, and, on December 22, 1793, *John Templeman*, had offered to purchase the lots, at a certain price, provided this strip of ground were thrown in; but the Commissioners, on the next day, had rejected the offer, because, in their opinion, the price named was inadequate. (Rec. VII, 2226–2227.)

The matter of price having been subsequently adjusted, the Commissioners, on January 24, 1794, (just one month after the execution of their contract with Morris and Greenleaf,) issued to Templeman a certificate for the lots, containing the following indorsement thereon:

"It is the intention of this certificate that the ground across the street next the water, with the privilege of wharfing beyond the street in front and of the breadth of the lots, pass with them, *agreeably to the general idea in similar instances.*" (Rec. VI, 162.)

The certificate itself was in the usual form, and the *indorsement* declares the operation that, notwithstanding its form, the certificate was designed to possess.

Thus, it appears that the privilege of wharfing might well pass with a sale of the land, notwithstanding the intervention of a street, and that, though, in the muniment of title executed to the purchaser, those privileges might not, in terms, be embraced, yet they were effectually included in the grant, by actual intention and design, as well as in conformity with the common understanding prevailing at the time.

There is no intimation in this indorsement, that the privilege of wharfing was designed to pass as an incident *to the ground across the street.*

It is declared, on the contrary, to be the intent of the certificate that the ground across the street, as well as the privilege of wharfing in front of the lots, shall "pass with *them.*"*

*About four years afterwards Templeman, from whatever motives, obtained from a new set of Commissioners, for the same ground across the street, the same privilege of wharfing and the same lots, one deed, (January 3, 1798,) and upon the cancellation thereof, another deed, (January 15, 1798,) not in anywise improving, in point of law, his rights and situation, as they had stood under the certificate. (Rec. VI, 203-204.)

This indorsement is of still greater significance, because it expresses not merely a cotemporaneous construction adopted by the Commissioners themselves, in the line of official duty, *but the general idea, also*, extending not exclusively to the case arising under the sale to *Templeman*, but to *similar instances* involving a like condition of the subject-matter.

When the construction of a deed or contract is doubtful "the practical interpretation by the parties themselves is entitled to great, if not controlling, influence."

Chicago *v.* Sheldon, 9 Wall. 54.
Steinbeck *v.* Stewart, 11 *id.* 576.
Irwin *v.* U. S., 16 How. 523, 524.

COTEMPORANEA EXPOSITIO EST FORTISSIMA IN LEGE.

It not only settles the effect of statutes, but has fixed the meaning of the Constitution itself.

Stewart *v.* Laird, 1 Cranch, 299.
Martin *v.* Hunter's Lessee, 1 Wheat. 351–2.
Cohens *v.* Virginia, 6 *id.* 418, 420.
Prigg *v.* The Commonwealth, 16 Pet. 620–1.
Cooley *v.* Board of Wardens, &c., 12 How. 315.
Schell's Executors *v.* Fauche, 138 U. S. 572.
Pennoyer *v.* McConnaughty, 140 *id.* 23.

In the light of this transaction with Templeman, it ought not to be difficult to discover the ground upon which, in their contract with Morris and Greenleaf, the Commissioners, in agreeing that those purchasers were entitled to the public lots in Young's land, included "the privilege of wharfing" not only as an incident "*annexed*" to the lots, but as passing with them as matter "*of course*."

Of the "Fair and Equal Division" of Lots Required by the Deed of Trust from Mr. Young.

By the terms of the conveyance made by *Notley Young* to *Beall and Gantt*, in trust, it is provided that the residue of the land, after certain streets and appropriations for the use of the United States, shall be laid off and parcelled into lots, and "*that a fair and equal division of them shall be made*" between the original proprietor and the public. (Rec. VI, 140; VII, 2183.)

In order to carry out this provision of the conveyance, it was necessary to observe equality in the division of the lots adjoining the river, as well as the lots lying at a distance from the water.

Of any given property, possessing the riparian privilege, there could be neither a *fair* nor an *equal* division, without apportioning with the land, the riparian privilege thus connected therewith, and upon which mainly its value depended.

That the Commissioners were not insensible to so obvious a consequence, their records, imperfect as they now are, furnish sufficient illustrations.

Square No. 1 was returned, bounded on the west "by 28th street west," on the southwest "by Virginia avenue," and on the south "by I street north," and it contained 22 lots, of which half were upland lots and half situate towards, or partly within, the water. (Rec. VI, 235–236.)

Of the upland lots, 6 fell on division, (January 4, 1793,) to the original proprietor and 5 to the public.

Of the 11 lots situate towards, or partly in, the water,

(*Diagram*, Rec. VI, 235,) 6 fell on division (January 4, 1793,) to the public, and 5, all fronting on 27th street west, and but one of them at all touched by the water, to the original proprietor. (Rec. VI, 235–236.)

Of these 5 lots Nos. 8, 9, and 10 were, 45 years afterwards, involved in 5 Cranch, C. C. 509, and were there adjudged to possess the water privilege, notwithstanding they were separated from Rock creek by 27th street west.

Square *No.* 2 was returned July 16, 1793, as bounded on the west by the Potomac 317 feet 7 inches, (Rec. VI, 236,) and square *No.* 10 was returned on the same date, as bounded on the west by 27th street west 246 feet 11 inches. (Rec. VI, 238.)

Through their transactions of November 11, 1794, (Rec. VI, 283,) December 18, 1794, (*id.* 169,) and February 12, 1795, (*id.* 171,) the Commissioners, on this last date, sold to General Stewart, under particular calculations, by "*square feet*," "the public's half" in upland squares 222, 119, and 75, and by "*feet front*," "the public's half" of 317 feet front in "water-lot" (*sc.* square,) No. 2* and of 208 feet front in "ditto" No. 10.

To the original proprietor the Commissioners assigned, in respect of square 2, one-half of its "*water front*," or 158 feet 9½ inches, and, in respect to square 10, the like proportion of "*water front*," or 123 feet 5½ inches. (Rec. VI, 249.)

Square south of 12 was returned July 30, 1797, as bounded on the west by 27th street and on the southwest

* As part of square 2 the Commissioners included square 7. (Rec. VI, 169, 283.) And wharves had been erected opposite squares 2 and 10, as early, certainly, as November 11, 1794. (Rec. VI, 283.)

by Water street, and to the original proprietor were assigned (besides two upland lots, in lieu of his *improvements* in a different square,) one lot on 27th street and another partly on that street and partly on Water street, and to the public two lots on Water street. (Rec. III, 821–822; Rec. V, third plat next before p. 121.)

In respect to 27th street the situation of square south of 12 was but the situation of square 10 noticed above. (Rec. V, fourth plat next before p. 121.)

Squares 801 and 802 were returned September 3, 1793, bounded 329 feet and 5 inches, the former, on the south, and the latter, on the north, by N street south. (Rec. VI, 246, 247.) Square 802 is entered in Division Book No. 1 as a "water front attached to the above," (meaning square 801,) of 329 feet and 5 inches, whereof the claim of the original proprietor and of the public was "164$8\frac{1}{2}$," (by error in Rec. for 164 feet $8\frac{1}{2}$ inches,) each. (Rec. VI, 250.)

Squares 853 and 883 had belonged to land of Daniel Carroll, and had been returned, on September 4, 1793, as bounded on three of their sides by certain streets, and on one of them by Georgia avenue. (Rec. VI, 247–248.)

Topographically, as may be seen from the Washington map of 1797, (Rec. V, immediately after p. 118,) each was considerably under water.

And in Division Book No. 1 it is noted that "the westernmost part of" square 883, "viz: $373\frac{1}{4}$ rectangular water front was considered as possessing water privilege." (Rec. VI, 251.)

Though of the latter square, the Commissioners had sold their "undivided moiety" to William Prout, they had ef-

fected no partition in either square between themselves and the original proprietor.

Both of these squares were desired by the Government, for the purpose of a navy yard.

An accommodation was readily arranged with Prout, who, for his undivided share in square 883, consented "to take water property in exchange," or, if no public water property of which he might approve were to be had, to receive from the Commissioners, with interest, what he had paid for that share.

Carroll agreed to surrender his interests in both squares, upon "receiving the same proportion of water property," within certain limits, on the Eastern Branch, "and the same proportion of ground" not answering that description, if such ground were no "further removed from the water than the property given up."

And to Carroll, in exchange for his part "of upland and water front in squares 883 and 884"* the Commissioners conveyed certain lots in squares 826, 611, 610, and N. 853, respectively, lot 2 only being transferred in square 610. (Rec. VI, 218–221.)

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* It may be observed, from the Washington map of 1797, that square 853 was the square immediately west, and square 884 the square immediately south, of square 883, and that square 884 was more largely situate in the water than square 883.

The final substitution, from whatever motive, of square 884 for square 853, as to the interest of Mr. Carroll, is unimportant in the present connection, since the object now attempted, is to show that to Carroll, as original proprietor, had been conceded one moiety of certain squares, between which and the water, in theory and on paper, a street intervened, with special reference to the distinctive character of those squares *as water property*, and that he exchanged such his interests in those squares only for lots in other squares, which though, in like manner, separated by a street from the water, were, nevertheless, admitted to fall within the description of *water property*.

Square 826 had also belonged to land of Daniel Carroll, and had been returned on September 4, 1793, and divided April 7, 1797. (Rec. VI, 247.)

According to such return, and according, also, to the Philadelphia plate, (Rec. I, immediately after p. 324; Rec. V, immediately before p. 77,) as well as the Boston plate, (Rec. V, immediately after p. 120,) the square had no other boundary, towards the south, than N street south, but upon the Washington map of 1797, (Rec. V, immediately after p. 118,) it is shown to possess a boundary, on the southeast, on Georgia avenue, and, on its entire eastern portion, to be located within the water.

And it is noted, in Division Book No. 1, "the south front of this square is considered as having the water privilege from Georgia avenue to the channel, and has been equally divided between the public and proprietor." (Rec. VI, 251.)

Square 611 had formed part of Carrollsburg, and had been returned, on June 6, 1793, bounded on the south by V street south, 335 feet. (Rec. VI, 244.)

The same boundary is shown, as well upon the Philadelphia and Boston plates, as upon the Washington map of 1797, by which last, however, part of V street south, towards the southwest portion of the square, is located in the water.

In Division Book No. 1, it is thus noted: "The south front of this square is water property on south V street, fronting three hundred and thirty-five feet thereon." (Rec. VI, 252.)

Square 610, also taken from Carrollsburg, was returned June 6, 1793, bounded on the south by V street south, 270 feet. (Rec. VI, 243.)

The like boundary for this square appears both upon the Philadelphia Plate and the Boston Plate, and also upon the Washington map of 1797, by which last, however, the southern portion of that square, and also all of V street south in front of that square, are located in the water.

The Philadelphia and Boston Plates represent square 612 as situate immediately south of square 610, and as bounded on the north, by V street south, and on the south, by W street south, but indicate no square south of 612, whereas the Washington map of 1797, though following those plates in respect to the location and boundaries of square 612, exhibits that square as wholly covered by water, and as having, immediately south of it, an unnumbered square, bounded on the north, by W street south, partly defined on its east and west lines and situated wholly in the water, which unnumbered square would answer, it is evident, the description of square S. of 612.

In 1825, Joseph Nourse, then Register of the Treasury, in reporting to a select committee of Congress the "water-lots" still owned by the Government, mentions squares 612 and S. 612, under the description of "water property attached to lots in 610," (Rec. IV, 1415,) but without intending, as is supposed, to claim for the United States *in the attached property*, an interest more extensive than they possessed in the square with which that property was considered as connected.*

The same mode of division was employed with respect to

* Nourse had had much official experience. Secretary to the Board of War in 1778, (5 Spark's Writ. 393,) he had been Register of the Treasury certainly as early as 1793. (1 Am. St. Pap. (Misc.) 58, 242, 304.)
See, also, Rec. VI, 204, 206; Rec. VII, 2251.

those squares on Water street, which were *divided* between Notley Young, as original proprietor, and the Government.*

And in the division effected on October 18, 1794, between Notley Young and the Commissioners, it is stipulated that "any error in calculation or otherwise," "shall be corrected, and the division made perfectly equal and just." (Rec. VI, 150.)

Yet the division of these squares *according to their water fronts*, must have been a ceremony at once idle and delusive, if it were understood at the time, that, in spite of this method of division, the whole of the water front must pass directly to the Government.

By further provision of the conveyance made to *Beall* and *Gantt*, the *streets* were to become the property of the United States, without expense to them.

It cannot be supposed that from this exercise of their liberality, the original proprietors anticipated or intended any consequence injurious to their interests.

The 18 squares in the land of Notley Young, which were bounded by Water street, were, as already explained, Nos. 233, S.E. 267, 270, 300, 329, 356*, 390*, 391*, S. 415*, W. 471, 472, 473, 503, 504, 505, 506, S. 506, and S. of S. 506.

Those marked with the asterisk were assigned to Mr. Young *for his improvements*, (Rec. VI, 249–250, 313–314; Rec. VII, 2143, 2145–2146; Rec. III, 1030,) at the rate of £12 10s. per acre, agreeably to the provisions of his conveyance to the trustees, (Rec. VI, 142,) and as they were not embraced in the general scheme of division between himself and the Commissioners, they would naturally not be measured by their riparian frontage, or frontage on Water street.

See the location of Notley Young's improvements, (Rec. VI, second plat next before p. 399.)

See also Rec. III, 1031; Rec. IV, 1991; Rec. VI, 195.

"For the streets," observes Mr. Justice Story, "they were to receive no compensation. Why? Because those streets would be of as much benefit to themselves as lot-holders, as to the public."

Van Ness *et ux. v.* The City of Washington, 4 Pet. 280.

It was calculated by Mr. Jefferson, that the gratuitous relinquishment by the original proprietors of lands *for streets*, would, in effect, reduce the compensation of the proprietors from £25 to about £19 per acre. (Rec. VII, 2181; *cf.* Rec. VII, 2176, 2183.)

Yet it is now contended that the designation of Water street was not only *not* productive of mutual benefit to the original proprietors and to the public, but that, whereas, in the absence of that street, the riparian privilege, upon "fair and equal division," must have been apportioned ratably between the public and such proprietors, the introduction of that street utterly divested those proprietors of all interest in the wharfing privilege, and converted it to the exclusive use of the Government.

Division Book No. 1.

This volume was originally entitled "Divisions of Squares No. 1, 1793 to 1796." (Rec. IV, 1672.)

Stewart* has altered its title thus: "Vol. 10, Divisions

* There seems to have been no limit to the liberty which this character conceived himself entitled to take with the nomenclature of records confided to his *protection*. (Rec. IV, 1672, 1715–1717.)

Men acquainted for more than a quarter of a century with many of

of Squares with Original Proprietors by the Commissioners of Public Buildings and Grounds in the City of Washingington and District of Columbia, 1791 to 1804." (Rec. IV, 1716–1717.)

It was held, in effect, by this Court, in 109 U. S. 681, that this volume was "not well authenticated as a cotemporary and original book," nor "one which it was the official duty of the Commissioners to keep," and that, however convenient it might prove "as a book of reference for examiners of title in facilitating searches," it had "not the quality of a public record."

1. But it is shown, from evidence in the present record, that Division Book No. 1 is as *well authenticated* as any other volume relating to the early affairs of the city, since no volume thus relating is found to be otherwise authenticated than by its apparent antiquity, the subjects it embraces and the custody in which it is discovered. (Rec. IV, 1719–1720, 1729–1730, 1788, 1790, 1793, 1794.)

Even *Stewart* is compelled, in effect, to so concede. (Rec. IV, 1502–1503.)

Whether the volume be cotemporary and original, and if not, what faith should yet be given to, or withheld from it, will be presently considered.

2. If it were not "the official duty of the Commissioners to keep" *this particular volume*, their plain official duty was to keep *a* book corresponding in contents with the volume in question.

Under section 7, of act of Maryland of December 19, 1791, ratifying her cession, it is provided, in effect, as already

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those records, under their original titles, know them no longer under their new descriptions. What was meant by this Court, in 109 U. S. 681, as Division Book No. 1, could not be conjectured from the title now assigned to that volume.

mentioned, that the Commissioners *may** appoint, for recording deeds, a clerk, who shall provide a book for that purpose, "and in the same book *make due entries of all allotments of land and lots made by the Commissioners.*"

Burch's Dig. 221–222; Davis' Laws, 68–69; 2 Kilty.

3. As this enactment required due entries to be made of every division; as the conveyances from the original proprietors exacted "a fair and equal division," and as the Commissioners could only make sale of the lots falling, upon division, to the public, *some* record became necessary to show the quantity of land allowed, on partition, to the original proprietor on the one hand, and to the public on the other, and, also, if water frontage formed part of the calculation, the proportion of such frontage due to each.

The Registers of Squares do not express the contents, even in square feet, of the squares which they contain, (Rec. VI, 254–265; VII, 2138–2154,) and, in many instances, some knowledge of geometry becomes necessary to determine those contents, from the mere face of the plats.

5. The number and order of the squares contained in Division Book No. 1, pursue the number and order of the squares contained in the Registers of Squares. (Rec. IV, 1507.)†

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* This word, for the protection of individuals, becomes, of course, imperative. (Supervisors v. U. S., 4 Wall. 446.)

† There are squares, however, volunteers Stewart, embraced in Division Book No. 1, which were added to the city after the preparation of "the Dermot map," (the Washington map of 1797,) and which, hence, do not appear on *that map*. (Rec. IV, 1708.)

He might have added that, for like reason, squares may be found in the Registers of Squares which do not appear upon that map.

6. We cannot too fully recall the explanation given of the course pursued by the Commissioners in the ascertainment, division and registration of squares, nor the delay, arising from such course, in the divisions of squares and the entry of those divisions in the Registers of Squares. This delay would postpone, of course, the record of any calculations founded upon such divisions, and will explain why the entries in Division Book No. 1 should not have preceded the entries contained in the registers of squares.

7. Division Book No. 1 does not contain the *frontage* of any square which lies not on, or towards, the water.

Rec. IV, 1674, 1675, 1743, 1797.

And the reason why the words *water front or front on Water street* were introduced in that volume, as it was perfectly clear to Mr. Gordon, (Rec. IV, 1738, 1740, 1743,) might also have been discovered by the witness, Stewart.* (Rec. IV, 1673–1674, 1710.)

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* Part of his examination was as follows:

Q. For what purpose, to your knowledge, were any entries made in the records of the Commissioners, in respect of water front; what object, if any, to your knowledge, had they in making entries in respect of water front?

Mr. TAGGART: Objected to unless attention is called to some particular entry.

(Note: No answer.)

Q. Calling your attention to entries in Division Book No. 1, now before you, upon the suggestion made by the counsel for the United States, by way of illustration, at square west of square 471, square 472, square 473, and square 503; I ask you for what purpose, to your knowledge, were entries made in this book in respect of those squares in regard to the water front of the property?

A. I know of no object that they could have in view but to describe the sides of those squares fronting on Water street agreeably to the King portfolio plan and the large plan of Water street prepared by Nicholas King, who I believe prepared this record.

8. Division Book No. 1 bears the water mark of the year 1795,* (Rec. IV, 1673,) and it refers, in the margin, to records, many, at least, of which are not now in existence, (Rec. IV, 1504, 1562, 1564, 1644,) and amongst such missing records, are the volumes designated A, B, C and D, respectively. (Rec. IV, 1506, 1507.)

To the four volumes last mentioned, there is found an *Index*, (Rec. IV, 1506,) the original title of which Stewart has supplanted with one of his own. (Rec. IV, 1715.)

Q. Would not the frontage of these squares upon Water street have been sufficiently indicated by designating the length of their boundaries upon Water street?

A. I do not think there is anything more than that in the record to designate the lengths of the squares on Water street, and it gives the same in this book as on the plan; but it does not show for what purpose.

Q. Would not the boundaries of the squares, to which I have referred, upon Water street, have been sufficiently indicated by referring to Water street without the addition of the words "water front"?

A. They might have been, but it makes it more clear to have the words "water front" added to it.

Q. Why should the description of a square bounded upon Water street be made more clear with reference to such boundary, by the adoption of the words "Water street"?

A. I am not aware that it would make any material difference, but it happened that the party who prepared this book chose to use the words "water front" in reference to certain squares, and "Water street" in reference to certain other squares on the same street; and I do not know if he had any particular motive in using the one in preference to the other or not. I think in some places it is "water front."

Rec. IV, 1673–1674.

It is scarcely necessary to say, that the front on Water street, or the water front, assigned to any given square in Division Book No. 1, (Rec. VI, 249–250, 313–314,) is merely the boundary on Water street of such square, as returned by the surveyors in 1793.

Rec. IV, 1412; Rec. VI, 254, 257–264; Rec. VII, 2140–2154.

* The water mark, it may be remembered, in the Registers of Squares, is of the year 1794.

9. Division Book No. 1 is supposed by Stewart to refer, also in the margin, to folios of a certain volume, bearing the water mark of the year 1801, (Rec. IV, 1536,) and originally entitled, "*Calculations and Divisions* 1794 *to* 1800, *No.* 1," (Rec. IV, 1504, 1505,) but now baptized by its custodian as " Vol. 11. *Calculations and Original Proprietors' Accounts with the Commissioners of Public Buildings* and Grounds in* the city of Washington and District of Columbia, 1794 to 1809." (Rec. IV, 1717.)

10. Division Book No. 1 is supposed, also, in the margin, to refer to certain sale books, (Rec. IV, 1506–1507, 1508,) of which there appear to have been numbers from 1 to 8, both inclusive, at the least, (Rec. IV, 1507–1508,) but one only of which is introduced by Stewart, in connection with Division Book No. 1. (Rec. IV, 1564.)

He has, indeed, produced also "six certain sales books, without backs, of stitched paper, ancient in appearance and condition, containing sales of property by the Commissioners from 1791 to 1802, inclusive." (Rec. IV, 1564.)

These he has caused to be bound in a single volume and entitled it, " Vol. 6. Sales of City Lots under the Direction of the Commissioners *of Public Buildings and Grounds* of the City of Washington and District of Columbia, 1791 to 1802." (Rec. IV, 1716.)

No identification is made of the property embraced in this consolidation.

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*This title is not only misleading, but chronologically absurd.

The office of Commissioner of Public Buildings was created by act Congress April 29, 1816. (3 Stat. 324.)

"Public Buildings and Grounds," in this city, are first mentioned, as to joint custody, in Rev. Stat. U. S., Sec. 1797, and are there placed in charge of the Chief of Engineers of the Army.

The same observations apply to the alterations made in the title to Division Book No. 1.

11. Stewart supposes "Division Book No. 1," from its statements, to have been prepared, after the year 1803, by Nicholas King, (Rec. IV, 1676,) such statements consisting of certain *Notes* made in the volume between the years 1804 and 1809. (Rec. IV, 1523, 1526, 1527.)

That great liberties have been taken with the records of the Commissioners and that some of them are to be found—

"With centric and eccentric scribbled o'er,"

is not to be denied.

But the *Notes* made between 1804 and 1809, in Division Book No. 1, no more establish the date of the preparation of that volume, than does the new title which Stewart has presumed to confer upon it.

12. The "Book of Calculations and Divisions" does not contain all of the squares which appear in Division Book No. 1. (Rec. IV, 1564.)

And, as we have seen, the title which Stewart had placed upon the former, carries its contents to a period five years later than he has assigned to the contents of the latter.

13. The Book of Calculations and Divisions indicates a water front to squares 233, (Rec. IV, 1543,) and 270, (Rec. IV, 1506,) and to two of the squares specially represented by the present brief, to wit: squares 472 (Rec. IV, 1504,) and 473. (Rec. 1504–1505.)

To these four squares a water front is also assigned, in the accounts kept by the Commissioners between themselves and Notley Young, or his heirs. (Rec. IV, 1513, 1514, *specially*, Rec. VI, 355, 358, 359.)

14. On January 3, 1816, the Surveyors report, in effect,

to the Superintendent, (successor in office to the Com missioners, under act Congress May, 1802, 2 Stat. 175,) that the records of their office have been found, upon ex amination, "to have suffered exceedingly by time, but especially by their removal, on the invasion of the British," and that, after a laborious collection and collation of the records and documents under their control, "such numerous errors have been discovered," that their work, still incomplete, must involve extensive prosecution, "because, in examining, upon the ground itself, the dimensions set down in the papers, we have found deviations from every record existing." (Rec. IV, 1618.)

15. Certainly, this Court has never compelled the citizen to become *insurer of the records belonging to the Government*, not required of him, in case of their loss, other evidence than that which was the *best* obtainable, upon the concession of loss.

THE CERTIFICATE GRANTED TO GREENLEAF, ON OCTOBER 18, 1794, EXTINGUISHED NO RIGHT ACQUIRED BY MORRIS AND HIMSELF, TO THE PRIVILEGE OF WHARFING, UNDER THEIR AGREEMENT WITH THE COMMISSIONERS, OF DECEMBER 24, 1793.

Under the provisions of the deed of trust, the original proprietors, for lots which should fall to them, on division, were to receive conveyances *from the trustees*. (Rec. VI, 141.)

But, under Section 3 of the act of Maryland of December 19, 1791, the original proprietor was to hold the squares falling to him, on division, by a species of remitter, as in

his "*former estate and interest,*"* and as if the squares "*had been actually reconveyed pursuant to the said deed of trust.*" (Act Md. 1791, ch. 45; 2 Kilty; Burch's Dig. 220; Davis' Laws 66–67.)

And the cardinal object with which one was "*remitted* to his first estate," was to preserve unimpared the original line and source of his title. (3 Reeves' Hist. Eng. Law, 226; Am. ed. Phila. 1880.)

No conveyances were required by that enactment to be made to Notley Young, by the trustees, and the certificates of division for squares, on Water street, allotted to him, on division, (Rec. III, 1010; VI, 201; VII, 2141, 2147, 2149, 2150,) and the entry by the Commissioners in their Proceedings, of the squares, on that street, assigned to him, for his *improvements*, (Rec. III, 1031; IV, 1991; VI, 195,) declare no more, in effect, than that the squares are to "*remain*" to him, agreeably to the deed of trust.

See, also, Rec. III, 686, 788, 822, 830, 1010, 1044.

If Notley Young might lawfully be reinvested with his original title to the land constituting the squares nearest the river, which fell to him on division, analogies were to be found to justify his reinvestment, if such were contemplated, with the privilege of wharfing originally annexed to that land, notwithstanding the nominal *severance* of that privilege from those squares by the paper line of Water street.

"If a man be remitted to the principal, he shall also be remitted to the appendant, or accessory, *albeit it was severed* by the discontinuee or other wrongdoer. And, therefore, if tenant in tail be of a manor whereunto an advowson is appendant, and enfeoffeth A of the manor with the appur-

*This, we may remember, was substantially the provision of the Maryland pioneer Town-act of 1683, ch. 5.

tenances, A re-enfeeoffeth the tenant in tail, *saving to himself the advowson*, tenant in tail dieth; his issue being remitted to the manor is consequently remitted to the advowson, although at that time *it was severed from the manor*. So it is in the same case if tenant in tail had been disseised and the disseisor suffer an usurpation, if the disseisee enter into the manor, he is also remitted to the advowson."

3 Tho. Co. Litt. 182,* 191,* (2 Am. ed. an. 1836.)

It is not claimed by these appellants, that the case of *severance* mentioned by Lord Coke involved no other principles than might arise from the severance of the riparian privilege by the Commissioners, from the land of Notley Young.

But the passage cited from that author, might well have furnished suggestions, if suggestions were material, to professional characters in daily contact and acquaintance with his pages.

It is affirmed in the preamble to the act of Maryland of December 19, 1791, "that an *incontrovertible title ought to be made to the purchasers, under public sanction.*"

2 Kilty; Burch Dig. 218; Davis' Laws, 65.

To quiet private possession, after the violence and confusion of civil war, by 4 Hen. VII, cap. 24, (borrowed from an act *temp.* Rich. III, which, "for some reason," was thought to require amendment,) all titles might be barred, after *the lapse of five years*, through fines levied with proclamations—"an admirable illustration of the manner in which changes of the law have grown gradually and naturally out of changes in the times."

4 Reeves' Hist. Eng. Law, 184–189 and notes. (Am. ed. Phila. 1880.) Hallam, Const. Hist., ch. 1.

The emergency arising upon the banks of the Potomac, was such as to evoke from the Legislature of Maryland a measure which, if constitutionally operative,* would throw over the titles or purchasers at the Federal city, a repose far more immediate and effective than any that could be shed by fines and proclamations.

By section 5 of act of Maryland of December 19, 1791, every purchase from one claiming title, and, for "*five whole years*" *next preceding the date of the statute*, in possession, either actually or through those under whom he claimed, was rendered "good and effectual for the estate" "against any contrary title," and the true owner must look for relief to his *action against the vendor for money had and received.*

Burch Dig. 221; Davis' Laws, 68.

Commissioners, August 29, 1797, to Nicholson. (Rec. VII, 2248.)

Under the deed of trust from Notley Young, the lots also falling on division to the public and sold by the Commissioners, were to be conveyed *by the trustees* to the respective purchasers in fee simple, "*according to the terms and conditions of such purchases.*" (Rec. VI, 141.)

The 5th section of the act of Maryland of December 19, 1791, pursuing the language of the trust and conforming to the general course of town legislation in that State, declares that such lots "*shall remain and be to the purchasers according to the terms and conditions of their respective purchases.*"

Burch's Dig. 221; Davis' Laws, 68; Act Md., 1791, ch. 45; 2 Kilty.

* In respect to due process of law, Art. 21 of the Maryland Bill of Rights was the equivalent of the 5th amendment to the Constitution of the United States. Bank of Columbia *v.* Okely, 4 Wheaton, 241.

Title to the purchaser, *according to the terms and conditions of his purchase*, is the fundamental guaranty and requirement both of the deeds of trust and of the statute.

Under the provisions of the deed of trust, this guaranty and requirement were to be rendered effectual, by conveyance *from the trustees*, in whom was reposed the legal estate.

The 5th section of the act of Maryland of December 19, 1791, enforces the guaranty and requirement by creating, immediately upon the purchase, an equitable statutory title in the purchaser, according to the terms and conditions of his purchase.

In 1855, Mr. Attorney-General Cushing, adverting to the "essential change" introduced by this legislation, in the mode of assurance contemplated by the deed of trust, and particularly to section 5 of the act, observed:

"This provision seems to have been designed to have the legal effect to vest in the United States the fee of all the lots conveyed for their use, and also to perfect the title of purchasers to whom sales should be made according to the terms of the act of Congress." (Rec. VII, 2281.)

It was under such the provisions of the deed of trust and under such the protection of the Maryland statute, that, in the land of Young, Morris and Greenleaf became purchasers of public lots, "*and, of course*," "*the privilege of wharfing annexed thereto.*" (Rec. VI, 146.)

And they acquired, through this investment, *an equitable statutory title, according to the terms and conditions of their purchase.*

And a statutory title ought not to be criticised.

Glasgow *v.* Baker, 128 U. S. 577.

No conveyance was made by the trustees to Morris and

Greenleaf, and it was not until November 30, 1796, that any of the squares in the city were conveyed by the trustees to the Commissioners. (Rec. IV, 1395–1399.)

The act of Maryland of December 19, 1791, does not profess in terms to interfere, in favor of purchasers, with *the legal title outstanding in the trustees.*

That at the suit of the purchaser, equity might compel a conveyance from the trustees, as holders of the legal estate, in accordance with the requirements of the deed of trust, was sufficiently obvious.

But, as long as the *legal title* was outstanding in the trustees, the *equity* of the purchaser was not subject to *dower;* (Williams *v.* Barrett, 2 Cranch, C. C. 673; Stelle *v.* Carroll, 12 Pet. 205;) it could not be reached by *execution;* (Sawyer *v.* Morte, 3 Cranch, C. C. 331; Van Ness *v.* Hyatt, 13 Pet. 294;) and would sustain no action of *ejectment.* (Lessees of Smith *et al. v.* McCann, 24 How. 398, 403.)

This situation of real property was intolerable.

Yet, as a large number of squares had been sold by the Commissioners to Morris and Greenleaf, on December 24, 1793, as sales as extensive, at least, in the aggregate, might be expected to occur in the future, and as purchasers directly from the Commissioners, might, in general, be supposed to have in view the alienation, more or less speedily, of some portion of their investments, considerable inconvenience and expense were likely to arise, from the number of formal and technical conveyances required of the trustees, for the release of their legal title, in numerous pieces of property.

By act of Maryland December 19, 1791, section 3, "*the legal estate and trust*" of all lands within the cession from that State, belonging to persons either incompetent to make, or omitting to make, conveyances to Beall and

Gantt, were vested in those trustees, in the same manner as if they had received from such persons, valid conveyances for those lands, of the form and import of the conveyances already made to the trustees, by Notley Young and other of the original proprietors.

Burch Dig. 219; Davis' Laws, 66.

And if the "magic" of legislation had been found equal to investing the trustees with the legal estate, it ought to prove adequate to transfer such estate from the trustees, when circumstances should render the transfer expedient.

To remove the complications which, under the doctrine of uses, had continually attended, in England, the existence, in each of two individuals, of a distinct and different technical interest in the same realty, it was enacted, in effect, by 27 Hen. VIII, cap. 10, that where one should be "*seised*" of lands, to the use of another, the latter should thereafter "stand and be *seised*" of such *lands* in like manner as he had been of their use, and the estate in the lands of him who had been "seised" to the use, should be deemed to be vested in him in whom the use had resided. (2 Bl. Com. 332–333; 1 Rob. Eng. Inst. 1004.)

This enactment transferred the use into possession, converted the interest of *cestui que use* into a *legal estate*, and annihilated the title of the feofee to uses. (4 Kent Com. 294.)

To extinguish the titles outstanding in the trustees, under the conveyances from the original proprietors, and to convert the equitable interests of purchasers from the Commissioners, into *legal estates*, was attempted to be accomplished by the Legislature of Maryland.

But where, as in Maryland, *registration* had become a feature in land titles, no legislation could become effective which pursued merely the provisions of the British statute.

To give any degree of confidence to investments, it would be necessary to make known the lots which, from time to time, should become subject, through sales by the Commissioners, to the influence of the enactment, and this notoriety could be effected only through instruments designed to be recorded.*

The instruments selected in this connection, were the *certificates* of the Commissioners.

It is provided, in effect, by section 1 of the act of Maryland of December 28, 1793, ch. 58, that certificates granted or to be granted by the Commissioners with acknowledgment of payment shall, when recorded, and without any deed or formal conveyance, "be sufficient to *vest the legal title* in the purchasers" in fee, "according to the import of such certificates."

2 Kilty; Burch's Dig. 224; Davis' Laws, 484.

The 5th section of the act of Maryland of December 19, 1791, did not profess, in terms, *to interfere with* the legal title, then outstanding in the trustees, and the 1st section of the act of Maryland of December 28, 1793, does not profess, in terms, *to operate beyond* the legal title then still so outstanding.

And, as to real property, in this city, it was held at March term, 1802, "that the Legislature of Maryland, in

* In our own day, a *patent* from the Government, though by no means essential to the title previously acquired under any legislative grant *in præsenti*, is found to accomplish, in practice, many objects of convenience in relation to such title.

Wisconsin Railroad Co. *v.* Price County, 133 U. S. 510.

Deseret Salt Company *v.* Tarpey, 142 *id.* 251.

1791 and 1793, had a right to legislate respecting private rights to the property, and were competent to enact in what mode the use of the property, *the legal title to which was vested in the trustees*, should pass. *That when the right of cestui que use accrued, the legal title, by virtue of the act of* 1793, *vested and followed the use, in a manner analogous to the operation of the English Statute of uses.*"

O'Neale Lessee *v.* Brown, 1 Cranch, C. C. 69, 71.*

Morris and Greenleaf, on December 24, 1793,† had purchased the public lots in Notley Young's land, *and, of course, the privilege of wharfing annexed thereto.*

Under the deed of trust of June 29, 1791, they were to receive, for the subject-matter of their purchase, a conveyance from the trustees, *according to the terms and conditions of the purchase.*

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* It is noted by Chief Judge Cranch, that he reported the "*reasons*" given in this case from his memory, which, —October 27, 1805,—might not be perfectly accurate.

But as he expresses no dissent from those *reasons*, he may be supposed to have concurred in them, and as the reasons themselves, in respect to the act of 1793, are undoubtedly sound, they may be thought to have been those which occurred to the Court.

† The second volume of Kilty's Laws had been published in 1800, and that Mr. Chief Justice Marshall, at February Term, 1810, (O'Neale *v.* Thornton, 6 Cranch, 69,) should assign to the act of Maryland, 1793, ch. 58, (Burch's Dig. 224; Davis' Laws, 484; 109 U. S. 678,) *a date contemporaneous with that of this contract*, must be attributed to the bills of exception, (6 Cranch, 53, 56–57,) which under a faulty practice of the times, contained *statutes*, as well as the tendencies of evidence.

See the special verdict in Fairfax *v.* Hunter's Lessee, (Rec. III, 1133–1134,) 7 Cranch, 608, 612, and in Cohens *v.* Virginia, 6 Wheat. 269–289.

No such date, or, to speak with accuracy, no date, whatever, is assigned to that enactment, in the report of the case as tried in the circuit court.

Thornton and White *v.* O'Neale, 1 Cranch, C. C. 269.

And, under section 5 of the Act of Maryland of December 19, 1791, the subject-matter of their purchase was to "*remain and be*" to them, according to the terms and conditions of purchase.

It is perceived, at once, that there existed no power in the State of Maryland to impair the obligation of the contract made by the Commissioners with Morris and Greenleaf—none to exchange, without the consent of the purchasers, the title they had acquired, for another and different title, of inferior, or even greater, value.

The Constitution of the Union was as restrictive of the faculties of that State, while legislating, during an anomalous era, for the District of Columbia, as when, at any time, enacting laws for her unrelinquished territory.

What, under that instrument, without exception as to time or circumstance, *no* State shall do, *every* State must be prohibited from doing, at *all* times and under *all* circumstances.

The surrender, then, by Morris and Greenleaf of their title by purchase to the riparian privilege annexed to the public lots in the land of Young must be established, if at all, by proof that to such *surrender* the purchasers expressly or by implication consented.

Their *express* concurrence in so serious a diminution of their title is nowhere, of course, disclosed or suggested in the record.

And their *implied* assent to the dismemberment can be deduced only, if at all, from facts and circumstances correctly arrayed and impartially interpreted.

The implication is sought to be established by the Government, through the voluntary acceptance from the Commissioners by Greenleaf, (for Morris and himself,) after the date of their contract, of a new assurance, supposed to be inconsistent, from its operation, in law, with the terms and

legal effect, and, hence, also, with the continuance, of the previous agreement.

This position substantially concedes, that it is only through the new instrument that the original terms of purchase have become affected, and that, in the absence of such instrument, or in case it had been rejected by Morris and Greenleaf, the terms of the original contract must have continued to prevail.

The position concedes, also, in consequence, that the terms of the original purchase are *no further* terminated, than as the new assurance has effectually ended them.

It is understood to be claimed, in effect, by the Government, that by virtue of the deed of trust from Notley Young, the title to Water Street became vested in the United States, in fee; that the riparian privilege was appurtenant to such street, and passed to the United States with and in like manner as such street; that on October 18, 1794, Greenleaf, (for Morris and himself,) voluntarily accepted from the Commissioners their certificate for the five squares on Water Street, which through division of the land of Young, had fallen to the public;* that such squares, though designated in the certificate by numbers only, were, in fact, bounded towards the river by Water Street, and possessed, hence, of no riparian privileges; and that this certificate, viewed in connection with the plats of those squares, constituted, under the Act of Maryland of December 28, 1793, the sole source of the title of Morris and Greenleaf to or in respect of the squares, the terms of the contract of December 24, 1793, having become merged in those of the certificate.

* The Government received, on that street, from the land of Notley Young, only squares 270, 300, 473, 503 and 504, (Rec. VI, 149,) the last two of which are specially represented by the present brief.

That, under the deed of trust, and without more, the Government would become owner, in fee, of Water Street, when duly established or authorized to exist, (subject to the legal estate in the trustees;) that the riparian privilege would be naturally appurtenant to Water Street, and with that street pass, also, to the Government, (subject to such legal estate;) and, that, in general, all prior transactions are understood and held to be, "merged in the final, settled instruments" executed between the parties, the present appellants are, of course, free to concede.

These admissions, however, still leave open for investigation questions of very material consequence.

1. Whether, upon the true construction of their conveyances in trust, it was the intention of the original proprietors, to provide that the entire riparian privilege originally connected with their property, should become vested in the United States, to the exclusion of the grantors from all participation in or equivalent for so valuable an incident.

2. Whether, if the above inquiry require an affirmative answer, the United States have surrendered, by way of easement, or otherwise, any portion of the dominion which it was within their power to acquire over that privilege.

3. Whether the nature of the certificate granted by the Commissioners to Greenleaf, on October 18, 1794, be such, in effect, as to extinguish the terms of the agreement, under which the purchasers acquired public lots, in the land of Notley Young, *and, of course, the privilege of wharfing annexed thereto.*

It is the last inquiry only, that will be noticed in the present connection.

The recorded certificate from the Commissioners, states

under their hands and seals and with the attestation of subscribing witnesses, that Greenleaf theretofore became purchaser of 857 lots, and had paid the whole consideration money therefor, *whereby* and by virtue of the certificate and *of the act of Maryland* in such case made and provided, he was "*legally* entitled to and *seised* of" the lots "in fee simple," the certificate then designating by numbers certain *squares*, as those in which the lots were contained. (Rec. VI, 151.)

The term "legally," to be found in the certificate, though in itself open to no definitive observation, assumes some importance, in connection with the expression "*seised of*," language which would not commonly be expected in so informal an instrument.*

The words "*seised of*" in the certificate are those, however, we may remember, which were employed in 27 Hen. VIII, when converting into a *legal estate*, the interest of the *cestui que use*, and extinguishing the title of the feoffee to uses.

The Maryland enactment intended to be described in the certificate, as that "made and provided" in the case for which the certificate was granted, is that of December 28, 1793, which, as we may likewise remember, renders the certificates of the Commissioners "sufficient to *vest the legal title* in the purchasers" in fee simple, "according to the *import* of such certificates."

It was the object of this enactment, as we may further recall, to cause the *legal title* outstanding in the trustees, to be vested in the purchaser, in analogy to the transfer made

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*See the very different language of certificates granted by successors in office to the Commissioners, (Rec. III, 693, 823, 840, 852, 889,) where, in form, a *judgment is rendered*, (3 Bl. Com. 396,) the words being, "*it is therefore considered*" that the purchaser is "*entitled to*" the lot in fee, agreeably to the act of Maryland of 1793.

to the beneficiary, under the statute of uses, of the *legal estate* of the feoffee to uses.

The certificate deals, then, with the *legal title* outstanding in the trustees.

It would happen, of course, that such an instrument must ordinarily prove in itself entirely satisfactory to the purchaser.

On sales of upland lots, whether for cash or on time, *the substantial terms and condition of the purchase*, would be retained, in general, in the certificate, on a sale *for cash*, because payment of the purchase money and the execution of the certificate would occur simultaneously—and in a sale *on time*, because under the Act of Maryland of December 28, 1793, the certificate was required *to recite*—and could not, hence, in strictness, *precede*—full payment of the purchase money.

And on the sale of *any* property, upland or lowland, the certificate must have been deemed quite sufficient, in practice, so long as the subject-matter of which the certificate purported to convey the legal estate was, upon the just construction of the certificate, substantially, both as to principal and to incident, that which had been actually acquired by the transferee, under the terms and conditions of his purchase.

But the certificate was not contrived nor adopted for the purpose of destroying or diminishing any equitable title with which the purchaser might have been clothed by statute.

It came, as the common law is said to come, "like a nursing father."

The certificate, and the enactment to which it owes

its operation, were equally intended *to protect and to defend* the interest so acquired.

They were designed to supersede the necessity of conveyances to purchasers, from the trustees, by vesting, through force of the certificate, the legal title in the purchaser, in like manner as if, in accordance with the requirements of the deeds of trust, that title had been actually conveyed by the trustees to the purchaser.

And it was the imperative provision of those deeds that the legal title should be conveyed by the trustees to the purchasers, in fee, *according to the terms and conditions of their purchases.*

If, under the terms and conditions of their purchase, Morris and Greenleaf acquired, with the lots in Notley Young's land, the privilege of wharfing annexed to the lots, the conveyance which, under the deed of trust, those purchasers became entitled to receive from the trustees, was a conveyance, in effect, not only of the lots, but of the privilege of wharfing, also, annexed to the lots.

And if the certificate granted by the Commissioners to Greenleaf on October 18, 1794, was intended as the equivalent and substitute of the conveyance which, under the deed of trust, those purchasers became so entitled to receive from the trustees, then is that certificate to be construed and interpreted as transferring with the lots the privileges of wharfing also.

Under section 1 of the Act of Maryland of December 28, 1793, the *legal title* is to be vested in the purchaser, by the certificate, "according to the import of" the certificate.

The statutory effect here prescribed for the certificate cannot be supposed to have been rendered dependent upon *the mere words* of the instrument.

A *record*, though it assert for itself no exemption from error, "*importeth*," nevertheless, an absolute verity.

Voorhees *v.* Bank U. S., 10 Peters, 475.

3 Co. Litt. 323, (ed. sup.)

3 Bl. Com. 331.

And a *deed* "*imports* a consideration," even when it may happen to express none. (Storm *v.* U. S., 94 U. S. 84.)

"*The import of*" the certificate, within the meaning of the Maryland Act of 1793, is, of course, *the operation, in law*, of the instrument.

With the legal estate to the land conveyed by the certificate, there is not conveyed, also, in terms, the privilege of wharfing.

Was the equitable estate of the purchaser in the *land*, which was the principal thing, merged in the legal title transferred by the certificate, and were the equitable and legal estates, *in the wharfing privilege*, the incident, designed to be left as distinct and independent, in theory, as if no certificate had been granted?

If so, then was the incident, by operation of the certificate, at once severed from its principal.

But if the certificate in question conveyed, in terms, no privileges of wharfing, neither had any such privileges been thus conveyed in the deed of trust executed to Beall and Gantt by Notley Young, as original proprietor; for that deed transferred only certain lands "with their appurtenances."

As the title of the United States is derived only from and under the conveyance from Notley Young, it follows, that the claim of the Government, as riparian proprietor, no less than that of these appellants, must be founded upon

a substantial annexation of those privileges to the granted premises, by way of incidents thereto, at the time of the respective grants, with the distinction only, that, whereas, the conveyance from Notley Young to Beall and Gantt employs the expression "*with the appurtenances*," its equivalent is not, in terms, contained in the certificate executed by the Commissioners to Greenleaf.

It was not necessary, however, that the word "*appurtenances*," or other kindred term, should be actually employed in any or either case, in order to transfer with the granted land any privileges of wharfing that might stand connected therewith by title, or actual annexation, at the time of the grant.

1 Tho. Co. Litt. 205, 215.
Sheets *v.* Selden's Lessee, 2 Wall. 187.
Kent *v.* Waite, 10 Pick. 14.
Atkins *v.* Boardman, 2 Metc. 462.
Brown *v.* Thissell, 6 Cush. 257.
Strickler *v.* Todd, 10 Serg. & R. 73.
Lansing *v.* Wiswall, 5 Denio. 213.
Morgan *v.* Mason, 20 Ohio, 401.

Hence, "whether a right of way or other easement be embraced in a deed, is always a question of construction of the deed, having reference to its terms and the practical incidents belonging to the land at the time of conveyance. The intention of the parties is to be learned from the facts."

Hulmeier *v.* Albro, 18 N. Y. (4 Smith,) 52.
1 Stark Ev. 710 (Sharsw. ed.).
1 Greenl. Ev. 294.
2 Taylor Ev. 850–851.

In Doe *v.* Burt, 1 T. R. 701, there had been a demise of certain rooms, under one of which was a cellar. And the question was, whether the cellar passed with those apartments.

Ashurst, J., said: "Considering the nature of this property, it was proper to let in evidence to show the state and condition of it, at the time when the cellar was granted. *Prima facie*, indeed, the property in the cellar would pass by the demise, but that might be regulated and explained by circumstances. Therefore, I am of opinion that, considering all the circumstances, it was proper to receive the evidence offered, which, when received, proved that the cellar was not intended to pass by the demise to the defendant."

Id., 703–4; 2 Phil. Ev. 619.

In Crawford *v.* Morris, 5 Gratt. 100–101, there was a similar ruling.

Bradley *v.* Wash. Alex. & G. S. P. Co., 13 Peters, 97.

Merriam *v.* United States, 107 U. S. 442.

So, in a conveyance of land and its appurtenances, it may be shown that a mill and dam pass, under the latter expression.

Hadden *v.* Shontz, 15 Ill. 582.

See, also, Bertsh *v.* Lehigh Coal & Nav. Co., 4 Rawle 139.

4 Kent's Com. 467.

And when lands are sold as lots "Nos. 130, 131, and 132," parol evidence may be properly received, to show what is appurtenant to those lots.

Hall v. Benner, 1 Penn. R. 140.

The relation of Water street to the property now in question, must be considered with reference to the condition of *the law*, as well as of that street, at the time of the certificate to Greenleaf, in order to determine what appurtenances may be considered as passing under that certificate with such property.

Nor must it be forgotten, it was not until thirty-six years after the grant of this certificate, that it was judicially ascertained that the fee, as distinguished from the use, passed to the Government, in any of the streets. And to interpret the certificate, not with reference to the situation and understanding of the parties, at its date, but in the light of a principle established more than a third of a century afterwards, would be manifestly inconsistent with the end which all canons of construction are designed to secure.

It is an ancient rule that "every grant shall be expounded as the intent was at the time of the grant." (Cro. Eliz. 35.)

"The Court," says Mr. Justice Story, "ought to take into consideration the circumstances attendant upon the transaction, the particular situation of the parties, the state of the country and the state of the thing granted, for the purpose of ascertaining the intention of the parties."

U. S. *v.* Appleton, 1 Sumn. 501–502.

Canal Company *v.* Hill, 15 Wall. 100–101.

Judges are "never shut out from the same light that the parties enjoyed when the contract was executed."

Nash *v.* Towne, 5 Wall. 699.

Merriam *v.* U. S., 107 U. S. 441.

See Codman *et al.*, Winslow, 10 Mass. 148.

It is to be remarked, however, that the nature of an appurtenance is not such as to convey, of necessity, the idea of immediate physical proximity between the appurtenance and the thing to which it is appurtenant.

A pew may be appurtenant to a messuage, though they be not locally adjacent.

1 Tho. Co. Litt. 207, note L. (Lond ed. 1818.)

So, common appurtenant "may be annexed to lands in other lordships." (2 Bl. Com. 33.)

The riparian privilege has been justly treated as *an incorporeal hereditament.* (3 Kent's Com. 419, 427.)

An incorporeal hereditament is not the object of our bodily senses. It exists only as a right defined by law. It is not the thing corporeal, with which it is connected, but an intangible property which issues out of it.

Title to the thing corporeal may belong to one man. The incorporeal hereditament may be, and often is, the property of another.

Thus, *common of pasture,* of *turbary,* of *estovers,* and of *piscary,* are the rights, respectively, which one man has to pasture his beasts, to dig, to take necessary wood on the land, and to fish in the waters of another.

So a right of *way* is that which one man has of passing over the ground of another.

And in all these cases, (unless, perhaps, in the case of *common of turbary,* which can be appendant, it has been said, only *to a house,*) the incorporeal hereditament may also be *appurtenant to lands.*

In the same manner, *Water street,* the thing corporeal, might belong to the *United States,* but the incorporeal right of erecting wharves in front of that street, might still be understood to be connected with the opposite squares.

Indeed, in this view, the right would constitute but an *easement*, under which description "may be included," says Chancellor Kent, "all those privileges which the public, or the owner of neighboring lands or tenements, hath in the lands of another, and by which the servient owner, upon whom the burden of the privilege is imposed, is obliged to suffer, or not to do, something on his own land, for the advantage of the public or of the dominant owner to whom the privilege belongs. These easements are incorporeal rights, and imposed upon corporeal property, for the benefit of the public *or other incorporeal property*."

3 Com. 419.

Washb. on Easements, 315, 512, &c. (3d Edit.)

It is obvious, too, that, in asserting rights of wharfage, the present appellants do not seek to enlarge the boundaries of the squares wherein they claim, any more than the owner of a given parcel of land, when claiming common appurtenant, an appurtenant right of way, or *any other easement*, can be justly said to insist upon an extension of the limits of that land.

The easement, if it exist, must arise, of necessity, from two distinct tenements, the dominant, to which the right belongs, and the servient, upon which the obligation is imposed.

Washb. on Easements, 3 (3d Edit.)

Hence, to assert a right to an easement, is to recognize that, in the land upon which it is imposed, the title is in another.

The doctrine of riparian rights itself rests, in many cases, upon the theory that the right is connected *not with the bed of the stream*, belonging to the public, and over which the

right is exercised, but with the adjacent *bank*, belonging to the individual.

In the House of Lords, in 1876, Lord Selborne said:

"With respect to the ownership *of the bed of the river*, this cannot be the natural foundation of riparian rights, properly so called, because the word 'riparian' is relative to the bank, and not to the bed, of the stream, and the connection, when it exists, of property on the bank, with property in the bed of the stream, depends not upon nature, but on grant or presumption."

Lyon *v.* Fishmongers' Co., L. R. 1 App. Cas. 683.
See, also, Railroad Company *v.* Shurmier, 7 Wall. 289.
Yates *v.* Milwaukee, 10 *id.* 504.
Delaplaine *et al. v.* C. & N. R.R. Co., 42 Wis. 229.
Diedrich *v.* N. W. U. R.R. Co., *id.* 262.

And "it is not necessary that the dominant and the servient estates should be in contiguity with each other," (Washb. on Easements, 3,) any more than it is requisite that an appurtenance should always be found in immediate proximity to the thing to which it is appurtenant.

It is obvious, also, that the claim of the appellants to exercise, in connection with their lots on the north side of Water street, the privilege of wharfing, in front of those lots, from the south side of that street, cannot be construed to contradict the maxim which prevents *land from being appurtenant to land*, unless upon the assumption that *an easement is itself land*, an assumption which, since it is, inevitably, *to land only* that any easement can be attached, must demonstrate, if true, *that no easement can legally exist.*

The term easement, says Chancellor Kent, "is a metaphorical expression, borrowed from personal servitude, but the charge is entirely attached to real estates and not to

the person. *Servitutum ea natúra est, ut aliquid patiatur aut non faciat. Servitutem non hominem debere sed rem.*" 3 Com. 435.

And this Court expressly distinguishes "*the soil and freehold*" of a street, which, because they are land, cannot pass by the term "appurtenances," from "a mere *easement*," which "may, without express words, pass as incident to the principal object of the grant."

Harris *et al. v.* Elliott, 10 Pet. 54.

Jones *et al. v.* Johnson, 18 How. 155.

See Gromley *v.* Clark, 134 U. S. 350.

As a consequence of that dominion which the owner may exercise over his own property, he may, whenever unrestrained by positive law, convey or transfer that property in such manner as he thinks proper.

And this he may do, not only in respect to the entire interest he may have in any given thing, but in respect of any portion of that interest, or any element thereof.

The grant of an estate for years, for life, or in fee, and in jointure, or in severalty, is not more within the power of the tenant in fee than the grant of common, of way, of the riparian privilege, or any other easement, or incorporeal hereditament.

So, the owner may separate his *upland* from his *flats* by alienating the one without the other.

Valentine *v.* Piper, 22 Pick. 94.

Knight *v.* Wilder, 2 Cush. 199.

By section 2 of act of Maryland, 1784, ch. 45, passed January 22, 1785, (1 Kilty; Davis' Laws, 478,) the owners of lots on the north side of Water street, at Georgetown, were to enjoy "the exclusive right to the ground and water on the south side of their respective lots, for the sole pur-

pose of making wharves," but were not "to erect any buildings on the wharves."

By act Congress January 14, 1823, (6 Stat. 281; Davis' Laws, 365,) the prohibition of the Maryland statute is construed to embrace "the *selling* or erecting buildings" either on the south side, or on any wharves made on the south side, of Water street; the prohibition, as thus construed, is repealed with proviso, nevertheless, against the erection on the south side of such street of buildings "not authorized" by an ordinance of Georgetown; and, by further proviso, it is declared, "That, after being thus authorized by said corporation, the proprietors aforesaid may sell and dispose of their property *on either side of the said street, without affecting their title to that on the other side*, as effectually as they could have done *before the passage* of the aforesaid act of Maryland."

And that the United States might retain the privilege of wharfing, if annexed as an incident to Water street, as part of their own property, or that they might sell and dispose of that privilege, to be used in connection with lands of which they no longer continued the proprietors, are propositions to which every mind would yield, it would seem, its assent.

For, if the United States could lawfully sell and convey, for private purposes, *the street itself*—as, under the rulings of this Court, the Government might, at pleasure, do, (4 Pet. 232, 234; 109 U. S. 681,) it could scarcely be less competent for the Government to part merely with the privilege of wharfing connected with that street.

Strictness of the Language of Decisions in this Court as to Appurtenances and as to Easements.

Undoubtedly language is to be found in many of the decisions of this Court, to the effect that one thing can never be *appurtenant to*, unless *essential to*, or *necessary for*, another.

Humphreys *v.* McKissock, 140 U. S. 313–314.
N. O. Pacif. Ry. *v.* Parker, 143 *id.* 55–56.

And in the first of the cases just cited, is quoted, with approval, the observation in 61 N. Y. 382, 390, that "even an easement will not pass, unless it is necessary to the enjoyment of the thing granted." (140 U. S. 314.)

Whether so strict a principle in respect to *appurtenances*, much less as to *easements*, might be understood to prevail in Maryland a century ago, must admit of grave question.

It could rarely or never happen, that land, if deprived of a *pew*, of *common*, or of *a cellar*, might be correctly asserted to remain without substantial use or value.

And it was assumed by Sir William Blackstone, that while *necessity* was the circumstance which had made common of pasture *appendant*, it was *the absence of necessity* which had rendered it *appurtenant*. 2 Com. 33.

1 Tho. Co. Litt., 226–227. (Lond., 1818.)

"A prescriptive right to a several fishery in a navigable river," might "pass as appurtenant to a manor."

1 Tho. Co. Litt., 232, note. (Ed. sup.)

But no one would suppose that the manor would be rendered actually useless, should its owner be deprived of the *oysters*, or of the profit arising from taking them.

The only requisite relation between the principal and its incident, which is announced by Lord Coke, is, that the thing appendant, or appurtenant, must "agree in quality and nature to the thing whereunto it is appendant or appurtenant; as a thing corporeal cannot properly be appendant to anything corporeal, nor a thing incorporeal to a thing incorporeal."

1 Tho. Litt., 207, ed. sup.

But, as has been shown by Mr. Hargrave, even such agreement is not universally indispensable, and that "the true test seems to be the propriety of relation between the *principal* and *adjunct*, which may be found, by considering whether they so agree in nature and quality, as to be capable of union without any incongruity."

1 Tho. Co. Litt., 207, n. 17, ed. sup.

In later times, also, the legal connection between the principal and its incident, has been deemed to be founded upon the nature of the incident, its accustomed use with relation to, and its necessity and fitness for, the convenient and beneficial enjoyment of the principal.

Angell on Water Courses, 153a; (6 edit.)

Whitney *v.* Olney, 3 Mason, 280.

Pheas on Rights of Water, 70.

It might be shown that, in numerous instances, and for the purpose of *advancing* the rights of riparian proprietorship, the Commissioners treated one square as "*attached*" or "*appertaining*" to, or as *included* in, another.

Thus, square 2, "*includes* square No. 7." (Rec. VI, 283.)

Square 3 "is considered as water privilege *attached to*" square 8; (Rec. VI, 249; see *id.* 162, 203–204, 278,) squares 612 and S. of 612, were "water property *attached to*" square 610; (Rec. IV, 1415;) square 802 was "water front *attached to*" square 657; (Rec. VI, 250;) and to squares 853 and 884, other squares "being entirely under water, are considered as *appertaining*." (Rec. VI, 218.)

In conveyances of property situate on the north side of Water street, wharves, wharfing privileges, water rights, and the like, are constantly embraced, as *belonging, appertaining, attached,* &c., to such property. (Rec. IV, 1368, 1369, 1370, 1371, 1373, 1374, 1376, 1378, 1379.)

And the privileges granted in the several colonies, to individuals, to erect wharves for the benefit of commerce and navigation, whatever the terms by which such privileges might be conceded, were in their nature the same, and constituted substantial rights of property.

IF THE LOTS BE FOUND ENTITLED TO THE WHARFING PRIVILEGE, IT IS IMMATERIAL THAT THAT PRIVILEGE BE NEITHER TECHNICALLY, "APPURTENANT" TO THE LOTS, NOR TECHNICALLY, AN EASEMENT.

If the court can perceive an actual and unrevoked concession to the squares fronting on the north side of Water street, of the privilege of wharfing into the Potomac, from the south side of that street, it can matter not by what

term the right arising from such concession may be most accurately described.

If the right be forbidden, from the language of art, to be designated as an *appurtenance*, or an *easement*, it must receive a different, or less technical title.

In respect to the lots in the land of Notley Young, the privilege of wharfing is described in the contract of December 24, 1793, as "*annexed* thereto."

But, at the date of that contract those lots, towards the Potomac, were bounded precisely as they are bounded to-day.

And if no privilege of wharfing is annexed to, or otherwise connected with them now, none could be connected with them then.

The day has long gone by, if ever it existed, when the judicial conscience may be satisfied to perpetrate, or can be held blameless in permitting, grievous and admitted injury, in uninquiring and subservient obedience to what is assumed or accepted as a legal principle.

For, since, in general, and especially, in the contemplation of a court of equity, all principles of law are supposed to be contrived for, and actually to converge to, the common end of justice, it may, in most cases, be well believed, that any asserted or accepted principle of law, which leads in its operation to grave and manifest wrong, will be found when explored, either to be arrested, or counteracted, in its tendencies, by some other principle, or else never of itself to have constituted a principle, it being justly remarked, that "a large portion of that legal opinion which has passed

current for law, falls within the description of law taken for granted."

Moore's Hist. Foreshore, 478, (3d ed. Lond., 1888.)

A Connection, Common, in Fact, Between the Riparian Privilege and Lots Between Which and the Water a Street Intervened, was Observable by the Commissioners, Within the Limits of the Cession, and Throughout the State of Maryland.

Of the connection, as matter of fact, of the riparian privilege, with lots separated from the water by a public street, the Commissioners could turn perhaps, to no portion of navigable Maryland, without observing some example. Such was the situation at Annapolis and at Baltimore.

And "from the very nature of wharf property," "access must be kept open for the convenience of the owner and his customers."

Irwin *v.* Dixon *et al.*, 9 How. 33.

And at *Georgetown*, where only, (except in rare instances,) the Commissioners assembled, the lot owner on the north side of Water street had been freely exercising and conveying the right of wharfing into the Potomac, from the south side of that street, from 1784, (Rec. V, on map immediately after p. 58; Rec. VII, on map immediately after p. 2494,) Act Maryland, January 22, 1785, (Davis' Laws, 478,) Act Congress, January 14, 1823, (6 Stat. 280,) and, at Hamburg, thrown into the city the Commissioners were establishing, the lots themselves, since 1771, had been found laid out into the Potomac, *from* Water street, as their northeastern boundaries. (Rec. I, plat immediately before

p. 325; VI, plat immediately before p. 399; Rec. VII, plat immediately before p. 2495; Rec. III, 793, 731, 700, 964.)

If it be conceded, what, indeed, it would be impossible to establish, that, in every instance brought to the attention of the Commissioners, in which, in Maryland, or within her cession, the right of wharfing was found to be connected, in practice, with private property separated from the water by a public street, that connection had been abnormal in itself, and created only through the positive intervention of the legislature, the concession cannot disturb the point of view which the existence of such a connection is now employed to illustrate.

For, if we suppose the Commissioners to have been insensible to the influence of conditions under which two of them they were bred, and which had long been universal in Maryland, yet, the Commissioners, when required to deal with riparian privileges of exceptional value and magnitude, would, naturally, determine how largely they should devote those privileges to public or to private purposes, not so much by reflections upon the method by which such privileges, when private, had, in that State, been rendered so, as from deliberations upon the advantages, or the reverse, which had been actually found to attend the long and extensive ownership of such privileges, when by whatever method committed to individuals.

In the natural order of investigation, the utility of indulging private dominion of those privileges would be examined in advance of inquiry into the process of establishing that dominion.

But the truth is, that where, in any statute of Maryland, incorporating a town situate on navigable waters, the privilege of wharfing is secured to lots between which and the water a street intervenes, as in the act of Maryland of January 22, 1785; ch. 45 of the Acts of 1784, (1 Kilty, Davis'

Laws, 478,) respecting an addition to Georgetown—it does by no means follow that such a provision either was, or was deemed to be, essential to the retention of that privilege, however much the insertion of the provision may have been recommended by motives of caution and precision.*

The statute would be, in general, substantially the act of the incorporators, and might be expected, therefore, to place their interests beyond the region of controversy or cavil. (Ruggles *v.* Illinois, 108 U. S. 534.)

It was perfectly well understood, in the early judicial history of this country, that where land was dedicated, or taken, without compensation, for a public street, or other highway, the *easement* thus created in favor of the community, effected no alteration in the title of the original proprietor *to the land itself.*

Harris *et al. v.* Elliot, 10 Pet. 55–56.

3 Kent's Com. 432, note *d.*

And if the original proprietor continued to be owner of the fee, in the street, which was the principal thing, he would continue to be owner, also, of the wharfing privilege incident to the land embraced in the street.

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* It might, with much more effect, be contended that the interference of the legislature became necessary to enable the town itself, as contemplated in the first section, and as provided in the second section, of the enactment, (1 Kilty, Davis' Laws, 477, 478,) to make and erect free wharves, for public convenience, opposite *Frederick* and *Fayette* streets, which terminated on the northern side of Water street, (Rec. V, plat immediately after p. 58; VII, plat immediately after p. 2494,) and at the end of *Gay* street, which extended to Rock Creek. (*Id. ib.*)

THE OBLIGATIONS OF THE AGREEMENT IN RESPECT TO CONDITIONS FOR THE ERECTION OF BUILDINGS WERE NEITHER DISTURBED, NOR UNDERSTOOD TO BE AFFECTED, BY THE CERTIFICATE GRANTED TO GREENLEAF ON OCTOBER 18, 1794.

The agreement of December 24, 1793, provided, as we have seen, for the satisfaction of the purchase money, for the 6,000 lots purchased by Morris and Greenleaf, at the rate of $80, (£30,) per acre, in seven equal annual payments, (without interest,) commencing from May, 1794. (Rec. VI, 144.)

It contained also, it may be remembered, covenants on the part of Morris and Greenleaf, to erect, annually, upon some portion of the property embraced by their purchase, 20 brick, two-story houses,* each covering not less than 1,200 square feet, until there should be erected 140 of such houses, and not to "sell or contract for sale of" any of the lots embraced in the agreement, prior to January 1, 1796, "*but upon the express condition* that one such house, at least, as above described," should "be built and erected on every third lot,† at the least, within four years after such sale or contract of sale." (Rec. VI, 147; 2 McMaster's History, U. S. 485.)

It will be observed, that the requirement to erect 140 houses, at the rate of 20 houses a year, distributed the erections over a period of seven years, ending in December,

* For houses of *three* stories, there was to be allowed a discount.

† 1,200 square feet of building, on every *third* lot, was, in ratio, the equivalent of the 400 square feet of building, on *each* lot, required by the early Maryland act of 1683, ch. 5.

1800, when the seat of Government was to be transferred to Washington, and it was obviously in reference to the same event, that any sales made by Morris and Greenleaf, prior to January 1, 1796, were required to contain provisions for the erection of houses, by their vendees, within four years after the sales.

On April 24, 1794, six days before the first payment would become due, this agreement was "*modified*," as has been seen, in such manner that, for the public lots in the land of Notley Young, embraced in the agreement, and estimated to be 1,000 in number, the Commissioners were to grant a certificate to Morris and Greenleaf as soon as those lots could be ascertained, or even before, if a general description thereof would be satisfactory to Morris and Greenleaf, upon the latter giving bond, in conjunction with *John Nicholson*, for $80,000, the purchase price of the lots, and for performing the obligations of the agreement, in regard to the erection of houses. (Rec. VI, 163–164, 328; VII, 2299; 1 Am. State Pap. [Miscel.] 220.)*

The agreement was then, also, further modified, as follows:

"And in order that Messrs. Morris and Greenleaf may have the advantage of disposing of any of their lots, amounting to 6,000, at their will, the Commissioners, on their as-

* If this feature of the modification has been, with correctness, supposed to relate only to such improvements as, under the agreement, were to be made directly by Morris and Greenleaf, (Rec. VI, 328; VII, 2299; 1 Am. State Pap. [Miscel.] 220.) as it does not, like the succeeding provision of the modification, refer, in terms, to the whole of the 6,000 lots embraced in the original agreement, the Bond, under this feature of the modification, would be conditioned, perhaps, for the erection of improvements, merely in that ratio to 240 houses, which 1,000 lots bore to 6,000 lots—that is, for the erection of but 40 houses.

signment, or order, will grant certificates or deeds in fee to such persons as they may from time to time require, acknowledging the payment of the consideration money and subjoining thereto the condition of improvement, (if any is to be made,) *according to the contract* of Messrs. Morris and Greenleaf; the Commissioners being willing to rely on the condition to be inserted in the certificate, or *on* (by error, *in*,) the responsibility of Morris and Greenleaf and Nicholson, as the case may require, for the improvement of every third lot sold by them before the 1st day of January, 1796, *agreeably to the tenor of their contract*, and the Commissioners are willing to allow the amount of one thousand lots, and the improvements on the whole number of lots, to rest on the joint and several bonds of Morris, Greenleaf and Nicholson, it being intended that a credit on their personal security may at any and all times amount to the cost of one thousand lots, as before mentioned." (1 Am. State Pap. [Miscel.] 224.)*

The covenants in the agreement of December 24, 1793, that Morris and Greenleaf should erect, and should engage their vendees to construct, certain buildings upon the property constituted a controlling consideration to that agreement, and is frequently mentioned, it has been perceived, by the Commissioners, as greatly contributing to the reduced terms upon which the property was permitted to be sold.

(Rec. VI, 225, 329; 1 Am. State Pap. [Miscel.] 133–134.)

In every civilized community, houses were, and remain, as indispensable as inhabitants, to the conception of a *city*, or town, whether *capital* or inferior.†

* Here quoted in full, because not contained in full in the Record, (VI, 329; VII, 2299.)

† The building requirement appears in the early Maryland enactment of 1683, ch. 5.

So, by section 7 of act of Maryland 1751, ch. 25, (passed June 9, 1751,)

The building *obligations* of the agreement of December 24, 1793, so far as respected the public lots carved from the land of Notley Young, were not avoided, nor understood to be avoided, by the modifications introduced into that agreement, on April 24, 1794, though *the security for the performance* of those obligations, (in case certificates, without building conditions therein, should be granted by the Commissioners to Morris and Greenleaf, or their vendees,) would be converted, from a security *real*, resting upon the retention of the legal titie, into security merely *personal*, resting upon the bond.

The objects with which the abstracts of title appear in the record, are not such as would embrace, incidentally, any extensive illustration of the conditions for building, imposed or omitted, by Morris and Greenleaf, in respect to their vendees

But the evidence is sufficient for the purpose for which alone it could be material, in the present connection, the purpose of showing that the certificate of October 18, 1794, was not understood to supersede the obligation of Morris and Greenleaf, under the agreement of December 24, 1793, to exact from their vendees conditions for building.

Among the five squares in the land of Notley Young, which were bounded towards the river by Water street, and conveyed by the Commissioners to Greenleaf, under their

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for the establishment of Georgetown, every taker-up of a lot was required "to erect, build, and finish thereon," within two years, "one good and substantial house," that should "cover four hundred square feet of ground, at the least," and "be made, in every respect, tenantable, with one good brick or stone chimney thereto." (1 Kilty; Davis' Laws, 472.)

Similar was the Virginia statute of 1748, erecting the town of Alexandria, except that the house was required to be "nine feet pitch." (Davis' Laws, 534.)

certificate of October 18, 1794, was square 503, one of the squares directly represented in the present brief.

On June 29, 1795, Greenleaf (through his agent,) entered into articles of agreement to sell unto one *Baker*, "four house-lots of ground," in that square, upon condition that the vendee, annually, for four years, "erect one good *three*-story brick house," on one of such lots. (Rec. IV, 2035.)

Mr. Ashford, (Rec. IV, 1750,) born in 1833, (Rec. IV, 1755,) lived in boyhood in "*Greenleaf's Row*," at the corner of O street, south, opposite the Arsenal gate. (Rec. IV, 1751, 1755.)

This row might, hence, and without more, have been situate *either* on square 503, *or* on square 504, both bounded on Water street and acquired by Morris and Greenleaf, under the agreement of December 24, 1793.

Mr. Ashford recalls also, from youthful memory, a series of neighboring dwellings, known as "*Michler Row*," fronting on 4½ street, between M and N streets, south. (Rec. IV, 1755.)

This latter row might, hence, and without more, have been located *either* on square 502, *or* on square 545, as may be seen from the Washington Map of 1797, (Rec. V, immediately after p. 118,) neither square being bounded by Water street, though both were embraced in the agreement already mentioned.

The houses in each row "were old-fashioned, thick-walled" structures, and were supposed by Mr. Ashford to have been erected about 1797, and to have been amongst the earliest of the city. (Rec. IV, 1755.)

His supposition seems to be reduced to considerable certainty.

By conveyance from *Nicholson et ux*, dated September 19, 1795, (but not recorded until April 28, 1797,) the two rows appear to have been constructed at the date of the

conveyance, and to have been together composed of fifteen brick houses, (with certain out-houses) situate on squares 502 and 503. (Rec. IV, 2056.)

On May 13, 1796, Greenleaf had conveyed certain property to Morris and Nicholson, (including that embraced in the Certificate of October 18, 1794, and including, hence, squares 270 and 300,) subject, nevertheless, to all the reservations, conditions, agreements, and the like "*to which the said property, or any part thereof, was subjected by the contract under which the same was purchased.*"* (Rec. IV, 2036.)

And, on May 12, 1797, Morris and Greenleaf,—in observance of the building provision contained in the Agreement of December 24, 1793, and thus imported into the deed last above from Greenleaf,—conveyed all of the lots in squares 270 and 300, unto *Duncanson*, upon condition that he erect thereon a two-story brick dwelling house, covering, at least, 1,200 square feet of ground, "for every three lots," of 5,265 square feet each, contained in those squares, (Rec. IV, 1976,) the average contents so prescribed for the lots being, as we may remember, the average contents as calculated under the Agreement of December 24, 1793. (Rec. VI, 145.)

In *three*, then, of the five squares bounded by Water street, in the land of Notley Young, and acquired by Morris and Greenleaf, under the Agreement of December 24, 1793, there had been executed by those purchasers, or by one of them, conveyances *upon condition to build*.

And prior to January 7, 1796, it was understood that up-

*This language is very comprehensive. It embraces, undoubtedly, and it hence, in law, *performs*, the obligations of Morris and Greenleaf, under the Agreement of December 24, 1793, to impose upon their vendees, *conditions of building*.

wards of 600 lots had been sold by Morris and Greenleaf, upon the stipulation, as required in the Agreement of December 24, 1793, that their vendees should erect houses upon every third lot.

Rec. VI, 326; 1 Am. Stat. Pap., (Miscel.,) 136.

These supposed sales would represent engagements, on the part of the vendees of the first purchasers, (the latter, however, resting under no liability for non-performance of such engagements,) to erect as many as 200 houses.

And the engagement to build, when rendered a condition of the sales made by Morris and Greenleaf, must have exercised the same influence upon prices, that it exerted, when inserted in the Agreement of December 24, 1793.*

The recognition *by Morris and Greenleaf* of the continuance, under the Agreement of December 24, 1793, of their obligation to build, and to require their vendees to build, upon lots in the land of Young, is, then, removed from honest controversy.

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* The conditions for building, though in their objects highly desirable, imposed, in practice, very serious restraints upon the active sale of property.

Some particular squares were sold by the Commissioners, in the spring of 1794, upon "terms of speedy improvement," (Rec. VI, 162, 164,) in July, 1794, upon conditions for improving "yearly;" (Rec. VI, 165;) and, in December of that year, upon conditions to build, "within two years," or "within four years." (Rec. VI, 169.)

And, on January 29, 1795, in a letter to the first President, the Commissioners, adverting to the prices they had recently received, say:

"Nothing but dire necessity ought to induce us to sell at those low rates, except in single lots, *for the purposes of immediate improvement.*" (Rec. VI, 170.)

How early, thereafter, it was found necessary by the Commissioners, to remove such impediments to the circulation of property, the record does not disclose.

But, by September 7, 1799, their sales were conceded to have become "unclogged with any condition for building." (Rec. VI, 222.)

Was the building obligation of that Agreement, as to lots so situate, viewed *by the Commissioners*, as merged and extinguished in their certificate of October 18, 1794?

The default made in building, by Morris and Greenleaf, was represented by the Commissioners to the President, *as delinquency in connection with the Agreement.*

If the language of this representation be admitted to contain no particular reference to buildings upon lots carved from the land of Young, that language must be conceded to be extensive enough to embrace buildings on such lots.

On January 28, 1801, the Commissioners, (Mr. Cranch amongst them,) in a communication to President Adams, after detailing the terms of the Agreement of December 24, 1793, and the extent of the property therein included, remark:

"Notwithstanding the favorable prospect which this transaction for a time afforded, the scene soon changed. The purchasers not only failed to pay the instalment which became due in May, 1795, but early in that year discontinued the *buildings which they had commenced under their contract, and in which very little progress had been made.*"

1 Am. St. Pap. [Miscel.] 220; VII, 2299.

But, under the Agreement of December 24, 1793, it was not incumbent upon Morris and Greenleaf to erect any buildings, whatever, sooner than within one year from the date of that Agreement; in other words, they were not required to place any buildings in a state of completion, prior to December 24, 1794.

The certificate granted by the Commissioners to Morris and Greenleaf, bears date October 18, 1794; and if it were the effect of that certificate to extinguish the Agreement, as to lots in the land of Young, Morris and Greenleaf were not compelled to defer, until *early in* 1795, their discon-

tinuance of building operations upon such lots, but, on October 18, 1794, might lawfully have arrested the completion of any structure then in progress thereon.

The certificate was not deemed, then, either by Morris and Greenleaf, nor, as we are justified in presuming, by the Commissioners themselves, to terminate the building conditions of the agreement, as to lots in the land of Notley Young.

But, if the certificate were ineffectual to obliterate these conditions of the agreement, it was also unavailing to destroy the privilege of wharfing purchased under that Agreement.

The certificate could not remain inoperative upon the recurring burdens, but become immediately fatal to the advantages of the agreement.

AS THE COMMISSIONERS NEVER QUESTIONED THE CONTINUED OBLIGATIONS OF THE BUILDING CONDITIONS OF THE AGREEMENT, NEITHER DID THE COMMISSIONERS EVER, AT ANY TIME, INTIMATE A SUSPICION, THAT THE AGREEMENT HAD CEASED TO BE PROTECTIVE OF THE PRIVILEGE OF WHARFING ACQUIRED THEREUNDER, IN THE LAND OF NOTLEY YOUNG.

It will be found, on the other hand, that the Commissioners repeatedly turned to that agreement, to interpret, in the light of its provisions, the rights of the parties to it.

It is not to be doubted, that Morris and Greenleaf, in stipulating for "the privilege of wharfing," in the Agreement of December 24, 1793, intended to secure the substantial advantages of riparian proprietorship.

On the day before the date of this Agreement, the Commissioners, in a letter to the first President, observe:

"Messrs. Greenleaf and Morris do not bound themselves to the city; they have embraced the Great Falls, and seem desirous of acquiring on other parts of Potomak." (Rec. VI, 161.)

And, as late as February 15, 1800, the Commissioners informed the Governor and Council of Maryland, that the lots selected by Morris and Greenleaf, under the Agreement of December 24, 1793, "were selected in great measure from the whole public stock in the city, and were consequently among the best the Commissioners held." (Rec. VI, 223.)

By the terms of the Agreement of December 24, 1793, Morris and Greenleaf were declared "entitled to the lots in *Notley Young's* land," "and of course, to the privilege of wharfing annexed thereto," but were denied, in general, the right of selection in "the *water lots*," including the *water lots* lying on the Eastern Branch, and also, one-half of the lots lying in Hamburg," but, "lots adjoining the *canal*," were not to be "reckoned water lots." (Rec. VI, 146.)

From the selection of "water lots," *in general*, Morris and Greenleaf were, by this Agreement, excluded.

But to such lots, with the privilege of wharfing annexed thereto, *in the land of Notley Young*, as were embraced in the Agreement, Morris and Greenleaf were thereunder expressly entitled.

Their exclusion from "water lots" *in general*, is then, no more explicit than their admittance to lots, *in particular*, possessed of wharfing privileges, to wit, *in the land of Notley Young.*

And the distinction between the rights acquired by Morris and Greenleaf, under the Agreement, to lots, possessed of the wharfing privilege, *in the land of Notley Young*, and to lots possessed of the like privilege, *in the*

residue of the land mentioned in the agreement, is frequently illustrated and enforced, as well by the acts as by the declarations of the Commissioners.

Besides the certificate of October 18, 1794, for 857 lots *in the land of Notley Young*, the Commissioners, about the same time, had granted to Greenleaf, with the subsequent approval of Morris, (Rec. VI, 167,) three certificates for the residue of the 6,000 lots involved in the Agreement of December 24, 1793, *and situate beyond that land*—two, each for 500 lots, and one for 1,000 lots.

Rec. VI, 212.

Selections under these additional certificates extended over a period of more than two years; and it is not until January 31, 1797, that the Commissioners thus communicated to the first President the completion of those selections:

"We have at length got through Messrs. Morris and Nicholson's selection, which has been a work of much time and trouble." (Rec. IV, 1551; VII, 2239.)

In the progress of the selections made by Morris and Greenleaf, (or their vendees,) differences of opinion were found to exist between those gentlemen and the Commissioners, in respect to the right of choice by the former, in particular "*water lots*," and the principles asserted by the Commissioners, under such circumstances, were in effect that the rights of Morris and Greenleaf to lots possessed of the riparian privilege, had been fixed and established by the agreement of December 24, 1793; that, by that agreement, Morris and Greenleaf had been excluded from the selection of "water lots" *except in the land of Notley Young* and on the *canal*,* and that from the terms of the agreement, no departure was to be indulged.

* "Lots adjoining the *canal*," as we have seen, were *not* under the agreement, "reckoned water lots." (Rec. VI, 146.)

These principles were fully developed and established, in a controve arising, in 1795, between the Commissioners and *Thon Johnson*, of Frederick, Maryland, claiming under Gree leaf, in respect to squares W. of 4, situate on "the waters of *Rock Creek*," (Rec. VI, 174,) and hence, beyond the limits of the land of Notley Young, and which, though shown neither upon the Philadelphia Plate, (Rec. I, immediately after p. 324,) nor upon the Boston Plate, (Rec. V, immediately after p. 120,) was bounded, according to the Washington Map of 1797, (Rec. V, immediately after p. 118,) by K, L, and 27th Streets and by Rock Creek, in which stream the square was partially located.

Mr. Johnson having claimed one-half of this square, a special session, at which he attended, was held by the Commissioners, on January 9, 1795,* to consider such claim. (Rec. VI, 173,) and some misapprehensions having subsequently arisen, as to circumstances occurring at, and shortly after, that session, the Commissioners, on February 18, 1795, caused their version and statement of such circumstances, to be entered at length in their proceedings. (Rec. VI, 173–177.)

From this entry, it appears that the subject being opened, at such session—

"Mr. Scott immediately remarked, that Mr. Greenleaf was excluded from a selection in *water lots*, and that we could not grant a certificate *under Greenleaf's right*."

Dr. Thornton, without hesitation, delivered his opinion to the same purpose.

Our opinion was repeated more than once, and with firmness. Dr. Thornton observed, that as Rock Creek was not expressly excluded *in the contract*, from being considered as water property, which had been the case with the canal,

*The minute book of this session is not extant. (Rec. IV, 1562–1563.)

Rock Creek must therefore be considered, at least, by the present board, as water property." (Rec. VI, 174.)

And the entry adds, that, at the session in question, the Commissioners had, "in the most clear and positive terms, declared their opinion, that Mr. Greenleaf had no right to water lots *in that square*, nor to any other water lots, *not expressly included by the terms of his contract.*" (Rec. VI, 176.)

To William, (afterwards Chief Judge) *Cranch*, applying, on behalf of Johnson, (Rec. VI, 175, 176,) for a conveyance in the same square, the Commissioners, on February 5, 1795, "observe, that considering the square alluded to as water property, they presume Mr. Greenleaf is excluded from his selection there, *by virture* (*sic.*) *of his contract.*" (Rec. VI, 283–284.)

The pretensions of Mr. Johnson, so claiming in this square, were again repelled, by letters from the Commissioners, of February 15, 1795, (Rec. VI, 172,) and February 18, 1795. (Rec. VI, 173.)

On February 21, 1795, the Commissioners, in acquainting the Secretary of State, with the claim of Mr. Johnson to water lots on Rock Creek, and the rejection which the claim had encountered, remark:

"Morris and Greenleaf, by *their contract* of the 24th of December, 1793, became the purchasers of 6,000 lots, *many of which were, by express stipulation, water lots.* * * * We think *the contract*, in explicit terms, excluded these gentlemen from a selection in any water lots, *except on Notley Young's property and the canal.*" (Rec. VI, 177, 288–289.)

Finally, and pending litigation, the contention of, and on behalf of, Morris and Nicholson, (the latter claiming under Greenleaf,) in respect to water lots *on Rock Creek*, was completely renounced.

On November 29, 1796, the Commissioners direct the insertion in the "City Gazette" of an article in which appears the following:

"Morris and Greenleaf, by their *contract* for the purchase of lots, were *excluded from the right of selection in* CERTAIN *water lots.* The contract was so worded as to create a doubt with regard to its true construction; the Commissioners were of opinion that the exclusion extended to the waters of *Rock Creek*, and in this they were supported by the opinions of the Attorney General of the United States, and other eminent counsel. Morris and Greenleaf entertained different sentiments, and, it is believed, had different advice. The Commissioners proceeded to sell a lot in that predicament; a lawsuit naturally ensued, which has lately been compromised, by a relinquishment, on the part of Morris and Nicholson, of all rights of selection in lots adjacent to *Rock Creek*, upon condition that the Commissioners would convey to the purchaser under those gentlemen, the lots alluded to by Mr. Walker." (Rec. VI, 194.)

Squares 954 and 955, neither of them made from the land of Young, were bounded, the former, by N, O, 9th and 10th streets southeast, (Rec. VI, 248) both upon the Philadelphia Plate (Rec. I, immediately after p. 324,) and the Boston Plate (Rec. V, immediately after p. 120,) as well as upon the Washington map of 1797, (Rec. V, immediately after p. 118,) and the latter, towards the Eastern Branch, though both upon the Philadelphia Plate and the Boston Plate, by the public street exhibited on those Plates as extending along that water, yet, upon the Washington map of 1797, by the Eastern Branch itself, in which, by that map, the square was left largely located.

Duncanson, desiring to become purchaser, in one or both of those squares, is informed by the Commissioners, on September 4, 1795, that they are not at liberty to

dispose of square 954, by reason of the outstanding right of selection therein by Morris and Greenleaf, "as it is *not water property*," but that they have no objection to selling him the public part of square 955, which "*is* entitled to a *water privilege*." (Rec. VI, 187.)

And, on September 4, 1795, as follows:

"We find, on recurring to our last letter to you, dated the 2d inst., it is therein explicitly stated, that Morris and Nicholson have a selection in square 954, but not in square 955. *The contract has fixed this selection and we have no right to alter it.* We have full power to sell one undivided moiety of square 955, and have no objection to sell to you or any other gentleman." (Rec. VI, 187.)

Construction of the Certificate Issued to Greenleaf Further Considered.

Amongst circumstances at which a court may look, in giving construction to a written instrument, is an antecedent agreement made between the same parties for the purpose of accomplishing the result which they have finally effected.

Blossom *v.* Griffin, 3 Kern. 569, 573.

See Bailey *v.* Railroad Co., 17 Wall. 96.

We have here presented *a sale and contract for sale* of certain lands to Morris and Greenleaf on December 24, 1793, and afterwards *an actual conveyance to Greenleaf alone* on October 18, 1794.

The relations existing between Morris and Greenleaf, in

their purchase under this contract, appear on the face of the instrument, (Rec. VI, 144–145,) and are anticipated in a letter addressed by the Commissioners to Mr. Morris, on the day preceding the date of the contract. (Rec. VI, 159.)

And the execution, under that contract, of a certificate to Mr. Greenleaf *alone*, was felt to require the concurrence and ratification of his co-contractor.

Hence, on November 5, 1794, Mr. Morris addressed the Commissioners as follows:

"Mr. James Greenleaf has requested me to express in a letter to you my approbation of the transfer which has been made in his name of certain building lots in the city of Washington, purchased of you on his and my joint account, which I now do in compliance *with your desire*, and his said request." (Rec. VI, 167.)

To determine the intention of the Commissioners, there are thus presented in the outset:

1. A contract of sale to Morris and Greenleaf of the lots, with "*of course the privilege of wharfing annexed thereto.*"

2. An inartificial conveyance, having, on its face, none of the formalities of a deed, to Greenleaf *alone;* and

3. The ratification of such conveyance by Morris, his co-owner, at the desire of the Commissioners.

In Landes *v.* Brant, 10 How. 372–3, the language employed in 5 Cru. 510, 511, was deemed to lay down "with great distinctness," the doctrine that "there is no rule better founded in law, reason and convenience, than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation."

Yontz *v.* U. S., 23 How. 498.

Steinback *v.* Stewart, 11 Wall. 575.

On the 22d of January, 1784, the Penns had agreed to sell and convey certain of their lands within the manor from which the town of Pittsburg was subsequently laid out and derived its name. On the 31st of December, 1784, they executed a conveyance of certain lots into which that town had been divided, according to an established plan.

In construing these two instruments, the court say:

"It is true, the deed was not executed until after the town plat was formed; but it was executed by force of a purchase made prior to the survey of the town, and the purchaser had a right to insist upon the boundaries designated in the agreement."

Barclay *et al. v.* Howell's Lessee, 6 Pet. 509.

The certificate to Greenleaf, being executed in pursuance of a purchase of the land "*and, of course, the privileges of wharfing annexed thereto*," made prior to the division of that land, the purchaser, or his grantee, is entitled to insist as well *upon all the incidents*, as upon the boundaries designated in the agreement.

It can matter not that Water street was contemplated from the commencement of the city.

The language employed by the Court in Hazelhurst *v.* The Mayor, &c., is of direct application.

"The highway thus established cannot make nugatory the wharfage right; if either is paramount, and a conflict arises between them, it is the former and not the latter which is subordinate and must give way."

37 Md. 216.

Nor is it material whether the fee in the street passed from the original proprietor, "for if it be conceded to remain in the State, that fact could in nowise limit or affect

the wharfing rights we have been considering." (37 Md. 218.)

See, also, Krantz *v.* Crawford, 18 Iowa, 549.

Cook *v.* City of Burlington, 30 *id.* 95.

Wharfing Regulations of July 20, 1795.

On July 20, 1795, the Commissioners, in pursuance of the 12th section of the Maryland act of December 19, 1791, but still invoking and receiving the concurrence of the first President, established the following regulations:

"That all the proprietors of water lots are permitted to wharf and build as far out into the river Potomac, and the Eastern Branch, as they think convenient and proper, not injuring or interrupting the channels or navigation of the said waters; leaving a space wherever the general plan of the streets in the city requires it, of equal breadth with those streets, which, if made by an individual holding the adjacent property, shall be subject to his separate occupation and use, until the public shall reimburse the expense of making such street; and where no street or streets intersect said wharf, to leave a space of sixty feet for a street, at the termination of every three hundred feet of made ground, the buildings on said wharves, or made ground,* to be subject to the general regulations for buildings in the city of Washington, as declared by the President, wharves to be built of such material as the proprietors may elect. (Rec. VI, 180–181.)†

Burch's Dig. 329.

Webb's Dig. 423–424.

*In the copy of these regulations introduced by the Government, the words, "or made ground," are inadvertently omitted. (Rec. VII, 2231.)

†Admitting that this "order," as far as he could learn, had remained unrevoked and unaltered, Mr. Attorney-General Wirt, in 1818, doubted

Davis' Laws, 74–75.
Rothwell's Laws, 468–469.
6 Robinson's Pract. 815–816.

What the Commissioners and the first President had in view, under these regulations, *was the promotion of instrumentalities of commerce* which national authority was unwilling or unable to directly provide.

The regulations were in analogy to what has often been done by State enactment.

"The legislature * * * says to public spirited citizens: 'If you will embark, with your time, money and skill, in an enterprise which will accommodate the public necessities, we will grant to you, for a limited period, or in perpetuity, privileges that will justify the expenditure of your money, and the employment of your time and skill.' Such a grant is a contract, with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it."

The Binghampton Bridge, 3 Wall. 74.
See New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 662–664, 670.

This regulation was quite in accordance with the policy which had prevailed, as we have seen, in most of the Atlantic States, and by which, for the encouragement of commerce, private ownership had been extended over the shores of

its "regularity," because it was *general in its application*, *whereas section* 12 of the act of Maryland of December 19, 1791, contemplated *several and separate* licenses. He considered, moreover, that portion of the order which related to *buildings*, upon the wharves, or made ground, to be void, the 12th section of the act authorizing the licensing of *wharves* only. (Rec. VI, 345–346.)

As to the *doubt*, it reduced matters, it must be confessed, to very refined, if not impalpable, distinctions.

navigable water, in a manner which was supposed to be unknown to the common law of England.

It was also in accordance with many particular provisions, by which that policy had been manifested.

At Boston.

In 1683, "the selectmen of Boston staked out a highway for the town's use on the southerly side of the land belonging to John Gill, deceased, (under whom the plaintiff claims,) being thirty feet in width, from the town corner of said Gill's wharf, next to the sea. This is the street since called Sumner street. They laid also another street "near the shore, on the proprietor's land, fifty feet towards the sea-shore." But they ordered, at the same time, that the flats and lands between the said highway and the sea be granted to the proprietors of the land, which are abutters on the way, in equal portions to their fronts."

The City of Boston *v.* Lecraw, 17 How. 433.

The owners of the streets exercised the right of wharfing. (*Id.* 434.)

At Charleston (South Carolina.)

By an act of November 16, 1700, it was provided, section 1, that all persons holding lots on the bay of *Charles Town* should cause a brick wall to be built before their land.

By section 3, "That every person as aforesaid shall have Liberty to make such and so many Stairs and Places for Conveniency of Ascent to the Top of their respective Wall, and also Wharffs to Low-Water mark, as they shall think

fit; Provided the said Stairs or Wharffs do not weaken the said Wall."

1 Trott's Laws South Carolina (edit. 1734), pp. 81–82. See *id.* p. 330.

And, especially, in *Maryland:*

1. At Annapolis.

(*a*) An act of Maryland, 1696, ch. 24, entitled "*An act for keeping good Rules and Order in the Port of Annapolis*," thus, in section 7, provides:

"And, whereas, there is a Quantity of Land, in the said Port and Town, laid out and assigned for Wharfage and Building of Keys and Wharfs and Warehouses thereon, it is hereby Enacted and Declared, by the Authority aforesaid," [the Assembly] "that if the owners of the Land next adjacent thereto shall omit, neglect or refuse to build such necessary Wharves, or Keys, or Warehouses thereon, for the propagating of Trade, as aforesaid, in eighteen months from the Publication of this Act, it shall be lawful to and for any Person or Persons to take up the same Land assigned for Wharfs, Keys and Warehouses aforesaid.

"And upon such Person or Persons building a substantial Twenty-foot square Brick Warehouse upon any Forty-foot square of the said Land, shall (*sic*,) invest such Person or Persons with a good and sure Estate of Inheritance in Fee Simple of, in and to every such Forty-foot of square Land upon which such Warehouse shall be built as aforesaid."

Bacon's Laws, Md. *ed. sup.*

(*b*) By the Act of Maryland, 1785, ch. 26, reciting, amongst other things, that "certain rules and regulations are necessary to enable the citizens of Annapolis to erect wharves for the convenience of trade, in such manner as not to prejudice the navigation of said port, either by en-

croaching too far upon the channel of the river, or by erecting wharves in such places of said port, or in such manner as may be deemed improper and prejudicial," it was enacted:

Sec. 1. That the corporation might appoint wardens of the port, who, by

Sec. 2. Were empowered to "determine upon and regulate all matters relating to the erecting or building of wharves in the said port," in respect to the extent, materials, manner and form of their construction.

Sec. 3. "That no person holding lands on the waters of said port, nor any other person whatsoever, shall, after the passage of this law, build or cause to be built, any wharf, or carry out, or cause to be carried out, any earth or other materials whatever for that purpose without license," &c.
2 Kilty.

2. At Chester-Town.

The 10th section of the Act of Maryland 1730, ch. 15, entitled "An act for laying out the Town now commonly called Chester-Town," &c., provides as follows:

"There being a Quantity of Land left out in the original Survey, between the Town line that runs along the River Side and the Water, convenient to build Ware-houses on, the Commissioners are empowered to lay out the Breadth of 60 Feet from the extremity of the Lots next the River, along the River Side for a Street, and to divide the Strand, lying between the said Street and the Water, into convenient Lots, distinguishing them by certain Numbers, always extending the Town Streets that lead to the River, through the same Strand, to the Water Side, which Lots being built upon, as before directed, within Eighteen Months after taking up of same, or Tender of payment made as before provided, shall be the Right, Property, and Estate of such

Persons so taking up, improving and paying, their Heirs and Assigns, forever."

Bacon's Laws, Md.

3. At Charles-Town.

(*a*) The preamble to the act of Maryland, 1742, ch. 23, (1 Kilty,) for the establishment of *Charlestown* on North-East River, is as follows:

"Whereas the encouragement of trade and navigation is the surest means of promoting the happiness and increasing the riches of every country, and that such trade is with the greatest ease and advantage carried on, when the same is drawn into and fixed in one or more convenient places, whereby it appears that erecting towns and granting proper immunities and privileges for the encouragement of people to inhabit therein, must greatly contribute to so desirable an end, and there being as yet no such place settled at or near the head of Chesapeake bay, although from the great extent of the country round, and the want of navigable water above it, the same seems altogether necessary; it is therefore humbly prayed that it may be enacted."

(*b*) Supplementary to the above was the act of Maryland, 1753, ch. 28, (1 Kilty,) which contained the following:

II. "And to the end that proprietors of water-lots may be encouraged to build wharfs and other conveniences for the better carrying on and promoting of trade in the said town, BE IT FURTHER ENACTED, That it shall and may be lawful for any person or persons having any lot or lots, or part of any lot or lots next adjoining to the water in Charlestown aforesaid, to build and make such improvements as they shall think most convenient, as far as the channel of North-East River, not exceeding in breadth the water front of such lot or lots, as shall belong to the builder of such wharf or wharfs, or other conveniences, and such builder or build-

ers shall have and enjoy as full and ample right to that part so built on as to any part or parcel of his or their lot or lots.

III. Provided Always, That there shall be left streets and alleys convenient to the water for public use, and also that the owners of such water lots so improved, pay the lord proprietor" the usual quit-rent of one penny an acre.

4. At Baltimore.

(*a*) By act of Maryland 1745, ch. 9, entitled "A supplementary and additional act to the act entitled an act for erecting a town on the north side of the Patapsco, in Baltimore County," it was provided in

Section 10, that "All improvements of what kind soever, either wharves, houses or other buildings, that have or shall be made out of the water, or where it usually flows, shall (as an encouragement to such improvers,) be forever deemed the right, title and inheritance of such improvers, their heirs and assigns forever."

1 Kilty; City of Baltimore *v.* White, 2 Gill. 444.

(*b*) By section 5 of the act of Maryland of 1784, ch. 39, (1 Kilty,) where individuals should make and extend ground, or other improvements, into the Patapsco, at Baltimore, the Commissioners of that town, on the application, and at the expense, of such individuals, were to cause the improvements to be surveyed, and laid out into streets, lanes, alleys, docks and canals, annexed to the town, and to have plats duly returned and recorded.

(*c*) Supplementary to the last above, was the act of Maryland of 1794, ch. 62, (2 Kilty,) which empowered the Commissioners of the town to do the like, on application of the proprietor, or of a majority of the proprietors, "of any wharf or parcel of ground made and extended into the waters of the Patapsco from any lot or lots."

(*d*) Subsequent to this, was the act of Maryland of 1796, Ch. 45, (2 Kilty,) the preamble of which recites that—

"A number of inhabitants of Baltimore Town, by their petition to the general assembly, have set forth, that for the want of convenient wharfs at the end of Baltimore Town, that part of said town is deprived of many advantages which it would otherwise enjoy, and therefore prayed that a law might pass, granting the proprietors of water lot permission to extend and wharf out the same."

The 2d section provides, "That each and every of the proprietors of lots binding on and entitled to the privileges of the water at the west end of Baltimore Town, between Pratt Street and Forest Street, shall be and are hereby permitted to wharf out, extend and improve the whole front of their several lots, respectively, and for such distance, as from time to time they may think fit, until they intersect the east side of a line drawn from the east side of Light Street, to the east side of Forest Street; provided, the whole front of each proprietor's lot on said (*sic*) be extended, and no dock or vacant space left on part thereof."

Sec. 3. "That the proprietors of said wharves shall be entitled, solely and exclusively, to the emoluments arising from the wharfage thereof; provided, always, that the proprietor or proprietors of said lots, in making out and extending the same shall be subject to the rules, regulations, and ordinances of the board of wardens, or other constituted authority of Baltimore Town, respecting the manner the said wharves shall be extended, and also for the regulation of the wharfage thereof; and provided, also, that eighty feet of the said wharves, when so made out and extended at the end thereof, parallel with the line of Forest Street, shall be deemed, taken and considered as a public highway forever thereafter, reserving, nevertheless, to the proprietors of the said wharves the benefit and advantage

of the wharfage thereof, under the limitations aforesaid."*

Sec. 4. "That the several streets hereafter named, to wit, Lee Street, Barré Street and Camden Street be continued and extended their present breadth to the intersection of a line from the east side of Light Street, drawn and continued to Forest Street, and they and each of them shall be deemed and considered forever thereafter public highways."

Sec. 5. "That each and every proprietor or proprietors of a lot or lots binding on the said streets, respectively, and entitled to be extended by this law shall, at the time of extending or wharfing out the front of their several lots, extend, fill up and wharf out the said streets, respectively, so far as the said lots are extended, improved and wharfed out, and not farther; and, in consideration of the expense and trouble attending the same, the person or persons so binding on said streets and so filling up, continuing and extending said streets, shall be forever entitled to the right of wharfage on and at the end of said streets, respectively, according to the number of feet front by them, respectively, filled out, and to all profits and advantages thereof; provided that, if the Special Commissioners of Baltimore Town shall elect to fill up, extend, or wharf out said streets, or any of them, they are hereby authorized and empowered to do so, at the public expense, and to retain the right, profits, and emoluments of wharfage, *at the respective terminations of said streets*, for the use and benefit of Baltimore Town, or to declare the same free and public wharfs; provided, also, that the said Special Commissioners shall, upon application to them made by the person or persons holding lots binding on said streets, or any of them, elect, within thirty days after such application, whether they will make out and extend said streets or not."†

The object of the Maryland enactments for the town of

* The highway mentioned in this section was, by act of Maryland of 1805, ch. 84, reduced from eighty to *sixty* feet.

† No map of Baltimore appears in the Record. But any good atlas, (that now before counsel is *Colton's*,) should show the relative situation of the streets mentioned in these enactments, and the location, in general, of the neighboring wharves.

Baltimore, and the nature of the rights they were intended to secure, have been well established.

In Casey's Lessee *v.* Inloes *et al.*, 1 Gill. 501, it was said:

"The right of extending her lot or wharfing out to the city dock, under the act of 1745, and the ordinances of the city of Baltimore, was a franchise; a vested right, peculiar in its nature; a *quasi* property, of which the lessor of the plaintiff could not be lawfully deprived without her consent."

"From a careful consideration of these statutes," the same court observed, in 1872, "it is apparent to our minds, the main purpose the legislature had in view, and the improvements they deemed important, was not the making of a public highway, but the construction and erection of wharves to accommodate and promote the commerce and trade of the city. And in order that this might be done without direct charge to the State or city, the legislature encouraged and induced private owners of water lots to fill out and build the wharves at their own cost and expense, by an express grant and reservation to them of wharfage rights and privileges."

Hazlehurst *et al. v.* Mayor, &c., Md. 215, 216.

"The highway thus established cannot make nugatory the wharfage right; if either is paramount and a conflict arises between them, it is the former and not the latter which is subordinate and must give way." (*Id.* 216.)

"Whether the fee in these sixty feet remained in the State, or passed by the laws to which we have referred, to the improvers, is a question more di cult than important to be determined; for if it be conceded to remain in the State, that fact could in nowise limit or affect the wharfage rights we have been considering." (*Id.* 218.)*

See, alsc Horner *v.* Pleasants, 66 Md. 475.

* Mr. Justice Matthews, (109 U. S. 685,) thus explained this case: "*There*, the street or highway that intervened between the wharf and

It can scarcely be doubted, that the policy thus established at Baltimore was such, also, as weighed with the Commissioners in adopting the regulations of July 20, 1795.

Yet within the cession over which their authority extended, there was furnished a precedent which could not readily have escaped attention.

5. At Georgetown.*

This has already been touched on in another connection.

By act Maryland 1784, Ch. 45, (1 Kilty,) reciting that certain proprietors had agreed to lay out an addition to Georgetown, and had prayed that an act might be passed confirming such addition, establishing the boundaries thereof and granting to those who should be "proprietors of the lots fronting on the north side of Water street, the exclusive right to the ground and water on the south side thereof, for the sole purpose of making wharfs, without being allowed to erect any building thereon, and vesting a power in the Commissioners of Georgetown, to improve, by wharfs,

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the water was, by virtue of the statute under which the work was executed, *made part of the wharf itself*, and subject to the right of the lot owner for the purposes of a wharf," &c.

But, surely, that learned and amiable judge would have hesitated to adhere to this language, had it been fully brought to his attention.

* By act Maryland May 22, 1695, Ch. 13, Prince George's County was to become such, from April 23, 1696, the latter date "being St. George's day." (1 Kilty.)

From this county, by act of Maryland of 1748, Ch. 15, (*id.*) was carved Frederick County, in which Georgetown, upon its creation by act of Maryland of 1751, Ch. 25, (*id.*) was first situate.

From Frederick County, on September 6, 1776, was erected Montgomery County, (See, 1 Kilty, *index*, note to Montgomery County,) and in this last mentioned county stood Georgetown, at the passage of the act of Maryland of 1784, Ch. 45.

Finally, by act Congress February 11, 1895, (28 Stat. 650,) Georgetown became part of the city of Washington.

for the public good, the land and water fronting *Frederick*, *Fayette*, and *Gay* streets," and reciting, also, that it appeared to the General Assembly, that "extending the limits of the said town" would "greatly contribute to the trade and commerce thereof, and be of general utility," it was provided:

"III. * * * That the proprietors of the lots fronting on the north side of Water street shall have and enjoy the exclusive right to the ground and water on the south side of their respective lots, for the sole purpose of making wharfs, but they shall not be allowed to erect any buildings on the wharfs so to be made by them.

"IV. * * * That it shall and may be lawful for the Commissioners of Georgetown, or the major part of them, and they are hereby empowered, to make and erect wharfs on the ground and water fronting on Frederick, Fayette and Gay streets, for the public good, which said wharfs shall be for the use and convenience of all vessels trading to the said town, without paying wharfage or any duty or imposition whatever, for using the same."

Davis' Laws, 476–478.

The repeal of the Maryland prohibition, in regard to *Buildings*, by act Congress January 14, 1823, has already been mentioned.

6 Stat. 280.

Davis' Laws, 365.

Burch. Dig. 310.

If a glance be thrown at the upper left hand corner of the Plats, (Rec. V, immediately after p. 58; Rec. VII, immediately after page 2494,) embracing the streets mentioned in this enactment, it will be perceived, at once, that the privileges of wharfing designed *to be public*, were such as were connected with the *terminations*, only, of *Frederick*, *Fayette* and *Gay* streets.

On the *Water street* front, the proprietors on the north side, became, as to the privileges of wharfing, the proprietors on the south side.

It is much to be regretted that such the legislation in respect to Georgetown had not been brought to the attention of this Court in *Linthicum* v. *Ray*, 9 Wall. 241.

Five years after the Maryland act of 1784, Georgetown became part of the District of Columbia.

In the foundation of the Federal city, it was natural for the Commissioners to consider the course of action at the elder and adjacent settlement, and to adopt, as far as was suitable to the situation at the new enterprise, what convenience had suggested at the old.

Wharfing Regulations of July 20, 1795, Further Considered.

The regulations established by the Commissioners * under date of July 20, 1795, had not been adopted without deliberation.

In their communication to the President, of July 24, 1795, the situation is elaborately reviewed by the Commissioners :

* The Commissioners were then, Gustavus Scott, of Maryland, appointed August 23, 1794, and William Thornton, of Pennsylvania, appointed September 12, 1794, (Rec. VI, 165–166,) in the places of Judge Johnson and Dr. Stuart, and Alexander White, of Virginia, appointed May 18, 1795, (Rec. VI, 180.) in the place of Mr. Carroll, but under circumstances, it would seem, which would prevent Mr. White from transferring his residence to Washington, before the middle of September, thereafter. (Rec. VI, 186.)

"On a subject so extensive," they observe, "it is not to be wondered at, that considerable difficulties have occurred, and it is not probable that all will be pleased, let the regulations be what they will. Had the legislature of Maryland been silent on the subject, the holders of water property in the city would have had a right to carry their wharves to any extent they pleased under the single restriction of not injuring navigation. The law of the State is, therefore, restrictive of that general right naturally flowing from the free use of property, and ought not to be construed beyond what sound policy and the necessity of the case may require; nor do we think it would be prudent to adopt any regulations which should so far damp the ardor of improvement in the city, as to induce foreigners and strangers to give decided preference to the neighboring ports, two of which command great natural advantages in common with the city.

A cursory view of the map of the city, will at once show, that many parts of the Eastern Branch, and some of the river, will not admit of wharves being built to advantage unless they are carried to a very great extent to meet the channel. The soundings of the Eastern Branch having been lately accurately taken, the result is enclosed, and seems strongly to justify the foregoing suggestion. It is, therefore, much to be doubted, whether, in these instances, at least, adventurers will incur the expense of building wharves to such an extent without the benefit of erecting warehouses on them. In every city which looks to commerce for her rise and extension, beauty must in some instances be sacrificed to utility. Perhaps the parts of such city where wharves and warehouses are of necessity to be erected, are and ought to be the last where beauty should be sought for. * * *

We beg leave, also, to remark, that no wharves, except by

the public, can be erected on the waters opposite to the public appropriations, or on the streets at right angles with the waters, which, being uncommonly wide, must alone furnish a great circulation of air from the waters. With respect to the private property on the water, we think the following regulations the most likely to meet with public approbation and to obviate the inconveniences which it is apprehended will arise from a total restriction of buildings on made ground or wharves:

Proprietors of property lying on the water to be permitted to build wharves of wood, stone and earth, as they may think proper, to any extent, provided such wharves do not injure the navigation of the river or branch.

The owners of such wharves or reclaimed ground to be also permitted to erect warehouses thereon, always leaving streets to conform with the general plan of the cross streets in the city, so as to make the whole plan uniform throughout, and where the general plan does not require such streets, as will be the case in many instances, then to be obliged to leave a street not less than sixty feet wide between the last warehouse on such wharf or made ground, to be forever kept open as a public street, and liable to all regulation which the general policy may require for other avenues, streets and alleys in the city. * * *

These restrictions, however mild, will probably retard, for some time the improvement of the water property in the city, situated as it is between two growing commercial towns, already possessed of considerable trade and population, and where proprietors are left to build as fancy or interest may dictate. Instances have already occurred of the restive spirit excited by the restriction to build of brick or stone. Yet the necessity of this regulation cannot escape the dullest observer; general safety as well as beauty would evidently be sacrificed by a relaxation from the rule.

We pretend not to say that the regulations proposed will meet with universal approbation. One general rule establishing the extent to which wharves may be extended, seems to be impossible, when a view is taken of the waters by which the city is bounded; nor does a total exclusion of all buildings on wharves, or made ground, appear to us to be either necessary or prudent. Our funds depend in some measure on sales, and sales on public confidence and opinion. Any measure greatly counteracting the hopes and wishes of those interested would certainly be injurious, and ought not to be adopted without an evident necessity. How far the rule applies to the present case is for the Executive to determine. Though the act of the legislature of Maryland vests the sole power of regulating the extent and licensing the building of wharves in the Commissioners, it is with pleasure they resort to the wisdom and experience of the Executive, from which they have ever received the most substantial aid, upon a subject so new and which ultimately must affect so much property, they have sought for information wherever they thought there was a chance of obtaining it.

The extensive influence it may have on the affairs of the city, called upon us to give the subject our best attention. The result, however, is submitted with great diffidence, and with pleasure we shall relinquish our ideas for the adoption of better." (Rec. VI, 181–183.)

That the first President, shortly after the report contained in this communication, wrote to the Commissioners, "concurring with the report," and desiring that "publication of the regulations * * * might take place as soon as possible," may be seen from the letters addressed by Commissioners Scott and Thornton, on August 10, 1795,

(Rec. VI, 184,) and August 12, 1795, (Rec. VI, 185,) to their associate, Commissioner White.

Notwithstanding the President was pressing for "an immediate publication" of the regulations, Messrs Scott and Thornton, apprehensive that the project of leaving a street 60 feet wide "between the last building to be erected on wharves, or made ground, and the channel" might often render the wharves unserviceable by projecting them into water insufficient in depth for commercial purposes, and "finding that the regulation proposed, might, in its operation, be attended with disagreeable consequences," on August 17, 1795, informed the Secretary of State that they had suspended its publication, in the absence of Commissioner White, and had requested his attendance, for conference and consultation. (Rec. VI, 186.)

On August 21, 1795, the wharfing regulations, as ultimately formulated by the Commissioners, were by them transmitted to the Secretary of State, but it was not until September 17, 1795, that they reached the first President, who, on the next day, addressed the Commissioners as follows:

"If the proprietors of water lots will be satisfied with the rules therein established for the extension of wharves and buildings thereon, the regulations will meet my entire approbation, and of their ideas on this head you have no doubt made some inquiries and decided accordingly."

What might be immediately done by the Commissioners, under these Regulations—what might be the earliest construction, if any, placed upon them by the Commissioners—it is not in the power of the wharf-owner to prove.

The records of the proceedings of the Commissioners, from July 31, 1795, to October 24, 1796, no longer exist. (Rec. II, 666, 667; Rec. IV, 1499.)

Water Street Built, Under These Regulations, in Great Measure, by the Proprietors of Wharves.

Whether, under the true construction of these Regulations, such space was to be *reclaimed* from tidal overflow, *by the public*, or *by the proprietors of the adjoining lots*, was a question which seemed to the Commissioners to present some difficulty. But of the necessity for the reservation of the space *itself*, their opinions were uniform and decided.

In their communication addressed to Commissioner *White*, on August 10, 1795, his colleagues observe: "It is by no means clear whether our report compels the proprietors of wharves to *fill up and make a street* 60 feet wide, *between the last building on such wharves and the channel*, or *only to leave a space* 60 feet to be hereafter made, and at the expense of the public. The language of the report rather leaves it to be inferred that the idea was not to compel *the making* of such street, but only the *leaving a space* whereon the *public*, at a future day, might make one, when circumstances would permit." (Rec. VI, 184.)

Two days afterwards, (August 12, 1795,) they inform the same gentleman, that they have received from Philadelphia, a certain communication from the President, but "when he comes to sum up the leading regulations in his opinion necessary to be published, that he totally omits *a street* between the termination of the wharves and the channel, and that he presses an immediate publication." "There is great reason to fear," they add, "that the single circumstance of *leaving a space* of sixty feet, *between the termination of the wharves and channel*, will *often end the wharf in four, five and six feet water.*

Mr. Hoban, agent for Mr. Barry, says the intended wharf, in his case, which he estimates to cost upwards of, twenty thousand dollars, will terminate in four feet water. (Rec. VI, 185.)

Replying to these communications, *Mr. White*, on August 17, 1795, remarks: "My object is to promote the growth of the city, by rendering it agreeable to mercantile characters. To accomplish this, I would sacrifice beauty to utility. I do not, myself, see the necessity of the 60 feet vacant spaces between the last building on the wharves, and the channel; and as at present advised, am willing that builders should not be restricted in that respect. I fear the leaving open spaces corresponding with the streets, will be considered as sufficiently burdensome." (Rec. VI, 186.)

The requirement of the *Building Regulations* seems to have been very generally observed by those constructing wharves in front of their property abutting upon Water Street.

No owner of a lot abutting upon Water Street, could erect opposite his lot, a wharf, to answer any useful purpose, without lowering, or cutting through, the river bank, in front of his property.

And the earth thus removed would be deposited, of course, in the Potomac, opposite the locality from which it was taken.

If the riparian owner first reclaimed in front of his lot, a space of 60 feet for Water Street, and then constructed his wharf to the south, or on the south side of such space, he would, in general, as to the reclamation of such space, be conducting a work of public improvement.

Of such privileges as he might derive from that reclamation, he would be, in the highest sense, a purchaser, for valuable consideration,

If the riparian proprietor should suffer the Potomac, for a width of 60 feet, to flow between his lot and his wharf, in what, in effect, would consist his privileges as such proprietor?

The riparian owner could be expected—no more than under these Regulations he was invited—to construct a Water Street except in front of such portion of his own property as he might desire to devote to wharfing purposes.

The necessities of the city,* until times comparatively recent, required no continuous and unbroken line of wharves on the south side of Water Street, and each wharf was, in the early days of the city, sufficiently circumstanced, when once it enjoyed its own avenue of approach by land, though possessing no street connection, in a direct line, with any other wharf.

THE PRESENT SITE OF WATER STREET FORMERLY LARGELY COVERED BY THE POTOMAC.

The records of the Commissioners contain little to explain the exact location, with reference to the shore line of the Potomac, of squares 472, 473 and 503, either at the date of the contract made by the Commissioners with *Morris* and *Greenleaf*, in 1793, or at the time of the nominal division of the property of *Notley Young*.

In his communication to the President, of September 25, 1803, Mr. N. King remarks: "Although the engraved

* The condition of the streets in the northwest section of the city, so late as 1866 and 1867, was made known to this Court, in Hammond v. Hopkins, 143 U. S. 258.

(See, as to the growth of streets and of improvements from the increase of population and business, Rec. IV, 1812.)

plans, as well as Major L'Enfant's, carried the streets *to the navigable waters*, exhibiting how the improvements and streets on the flats, which must be filled up to arrive at the channel, were to take place, it has been laid out on the ground, and acted upon in sales, no further *than the bank of the river*." (Rec. VI, 306; Burch Dig. 359.)

And he observes that the Commissioners, in laying off the city, stopped "*on the bank of the river*," and "sold the lots on the high ground, with a water privilege," without defining the nature of the privilege, or the extent or direction in which purchasers were to wharf and improve. (*Id. ib.*)

It is perfectly manifest from the Record, that, on October 18, 1794, no Water Street was, in fact, nor except on paper, laid out along the squares in question, and that in designating that street as one of the boundaries of those squares, the Commissioners resorted to an imaginary line, representing the future path of that highway.

And the question recurs, what, at that date, was the location, with reference to the shore line, of the present site of *Water Street?*

This question is not to be confused with the question, if such could arise, whether the squares bounded by Water Street, *were, in fact, so bounded.*

Morris and Greenleaf always had for their counsel, men, if not of the very first abilities, yet, certainly of ripe and unquestionable attainments, and *that*, in an era when the profession of law had not become, for the most part, a *trade.*

Water Street, *as an abstract legal boundary*, was as well understood then as now.

There can be little doubt that in the early history of the city, much, at least, of the present site of Water Street was subject to tidal overflow, and that, in many places, it so continued, until very recent times.

It is equally clear, that the reclamation of the site intended for that highway, was an essential feature of the regulations adopted in 1795.

That street has been largely made by cutting down the high bank and filling in the river, (Rec. IV, 1348, 1428, 1462, 1464, 1758–1759, 1849,) a process assisted, in some measure, by the action of the elements.

That, in their earliest recollections of the city shore-line, one high bluff extended along the Potomac, from what are now the Arsenal grounds, to the present site of the Long Bridge; that the Potomac washed the base of this bluff, at high tide; that, at such tide, travel below the bluff became impracticable, and that no street, answering to Water Street was then there in existence, must be considered as established upon the testimony of *Williams*, born on the Eastern Branch, in 1805, and acquainted with the shore-line in question, from 1819, (Rec. IV, 1775,) *Smithson*, born at Greenleaf's Point, (Arsenal grounds) in 1814, and from boyhood so acquainted, (Rec. IV, 1803,) *Pumphrey*, who had resided in South Washington, near the Potomac, for seventy-three years prior to 1891, (Rec. IV, 1814,) *Given*, born here in 1821, and whose recollections were furnished from a period but ten years later than those of Pumphrey, (Rec. IV, 1779,) *William R. Riley*, (Rec. IV, p. 1759,) and *Thomas W. Riley*, (Rec. IV, 1807,) his brother, both of whom came here in 1824, and had thereafter resided in the immediate vicinity of the river, *Zephaniah Jones*, with recollections extending back to 1828, (Rec. IV, p. 1772,) *Ball*, whose knowledge of the situation began in 1834, (Rec. IV, 1841,) *Boss*, who traced his information from 1836, (Rec. III, 1019–1020; Rec. IV, p. 1829,) *Mr. Mahlon Ashford*, (Rec. IV, 1751, 1755, 1756,) *Dowell*, (Rec. IV, 1827,) and *Baker*, (Rec. IV, 1845,) speaking from about 1846, *Mr. J. J. Johnson*, (Rec. IV,

1719,) from about 1849, (Rec. IV, p. 1720,) *Carter*, from 1856, (Rec. IV, 1777,) and *Spransy*, from 1859. (Rec. IV, 1822.)

Mattingly, testifying, in 1877, (Rec. IV, 1465,) in the cases reported in 109 U. S. 672* and who at the time of his testimony, had known the river shore for sixty years, (Rec. IV, 1479,) that is, since 1817, observes, that, in his earliest recollection, the tide, when high, broke against the shore, along which travel, at such tide, was impossible. (Rec. IV, 1480.)

Forsyth, some time Surveyor of the city, who came here in 1850, (Rec. IV, 1538-1539,) remarks, that at that time, there was no travel along the river bank, at high tide ; that this route was "impassable, for vehicles, between Page's wharf (opposite square 472,) and 10th street," and that the tide flowed to the river bluff between the Arsenal and the Long Bridge. He observes, however, there were certain openings between the Long Bridge and 10th or 11th street, where old docks were, and at Page's wharf, for passengers, on the projection of 7th street, for 400 or 500 feet, (Rec. IV, 1340, 1341, 1348,) more than the Water Street front of square 472, (Rec. VI, 242, 258 ; VII, 2147.)

In 109 U. S. 672, Mr. Joseph H. Bradley thus testifies :

"As far back as I can recollect, from Lenox's wharf, between 13th and 14th streets, to Greenleaf's Point, at the mouth of the Eastern Branch, the tide flowed up and struck against the high land, north and east of the north line and east line of Water Street, so that there was no shingle or beach where Water Street is now laid out, except at low

*Many of the witnesses in that litigation, men of years and character, and familiar with the early history of the city, had passed away before the close of the testimony in the present controversy.

Rec. IV, 1773-1774.

tide, where a portion of it only was disclosed, and, from time to time, portions of the bluff or high land were undermined and fell by reason of the action of the water. You could not pass even on foot, except at low tide, between these points." (Rec. IV, 1427–1428.)

"According to my recollection, for I have seen portions of it surveyed, *the whole of the north line of Water Street was within the ebb and flow of the tide*, but it was not defined by a visible object." (Rec. IV, 1428.)

"There may have been points where the high bank projected into the north line of Water Street, as now laid down, *but according to my best recollection the tides flowed up to and beyond the northeast line of Water Street.*

"Q. *Was such bank, except with the qualifications you have mentioned, if any, north of the present line of Water Street?*

"A. That is what I mean to say in my last answer; that it was.

"Q. And up to such bank did the tide reach?

"A. It did." (Rec. IV, 1463.)

The same witness, having stated that the "*White House*" was built on square 472, on cross-examination, testified as follows:

"Q. How far was the front of the White House, on Water Street, to the water in the Potomac?

"A. When I first knew it, Cana's wharf was built. The water flowed up to each side of Cana's wharf, and within, I should say, thirty or forty feet of the White House; it may have been a greater distance.

"Q. On what square was the building known for some time as *Jones' Tavern* built, and by whom?

"A. Square 356; built by William A. Bradley.

"Q. How far was it from the Water Street front of that building to the water in the Potomac?

"A. Until William A. Bradley erected a wall, in front of that house, in the river, and filled in with earth, *the water flowed up to about where the south wall of that house was erected.* I did not know then, and do not know

now, where the north line of Water Street ran, in respect to that house, but I do know the south line of that house was intended to be at or near the north line of Water Street. I have a distinct recollection of F. C. DeKraft, the city surveyor, trying to fix the north line of Water Street at that place, and to give the outlines of the block, which is a triangle, or nearly so." (Rec. IV, 1340, 1341, 1348.)

Nor is evidence wanting to show, that many of the squares on the south side of Water Street were themselves subject, in part, at least, to tidal overflow.

Mr. Joseph H. Bradley, in reference to square 356, states as follows: "*My memory is perfectly distinct that almost the whole body of that square was in the water*, and the bank was thrown down back of it for the purpose of filling it up, *and the water actually flowed where the* building called Jones' Tavern stood a few years ago." (Rec. IV, 1463.)

The same witness, on cross-examination, gave the following further testimony:

"Q. Could you state what change in the front line was produced within any given period?

"A. I cannot, as to the whole or any part. The map published by Boschke, in 1857, will give you a better picture of the shore of that part of the city than anything which I have seen, unless it be a map, of which I have a very indistinct recollection, in the office of the Commissioner of Public Buildings." (Rec. IV, 1456.)

And on re-examination, the following:

"Q. State, if you please, in what particular, with reference to the reach of the tides, on the river front, the Boschke map fails to confirm your recollections, and in what partic-

ular or feature, on the same subject, it corresponds with your earliest recollection.

"A. If the Boschke map, by the strong lines (by error, in Rec. IV, 1464, *line*,) next above the north line of Water Street, purports to represent high ground along the north side of the river—as I suppose it does—it is correct, according to my memory, except as to square 472, where the ground retained by Robert Y. Brent, and sold to George Page, is represented as having a bank falling far back to the front line of the square. *My recollection is that, from the northwest corner of that square, to near the 'White House,' there was along the line of what is now marked as Water Street, a high bluff which was taken down by Mr. George Page, before* 1857, *to fill up the wharves in front of that square.* The water flowed up to beyond the southwest corner of square 470, *then across Seventh street extended, and then struck the high bank;* at the base of that bank was the road and not a street, which I have before spoken of, and that road ran up into the city and was a country road, where now seems, on this map, to have been a ravine. The other difference, the only one which strikes me, is the apparent depth of the ravine, at the head of Lambell's wharf, and south of square 390, and a third is at the terminus at west 13th street, the shape and direction of which I do not recollect.

"Q. State, if you please, whether the serrated lines, on the Boschke map, next adjoining the line of Water Street, correctly indicate the rise of the river over the present line of Water Street, with the exception you have already indicated, according to your earliest recollection.

"A. They do; or very nearly so."

Rec. IV, 1464.

The map, (unofficial,) of Boschke, is referred to, on cross-examination, by the Government, in the present case. (Rec. IV, 918.)

And part of the examination of *Forsyth*, the surveyor, in relation to it, was as follows:

"Q. What was Mr. Boschke's reputation for skill,

ability, and accuracy in his profession as a civil engineer?

"A. He was a very competent man, and one of the principal assistants in the United States Coast and Geodetic Survey Office; he was, in my opinion, a painstaking, careful, accurate, and reliable man; and I would accept, without hesitation, a certificate, in the line of work in his profession, which he had made, as being a truthful embodiment of the facts. He was 'A No. 1,' and would do nothing but what was right.

"Q. Is this map, to which your attention has been called, regarded as a truthful map of the condition of the city and of the Potomac River at the time that it was prepared, to wit, in the year 1857?

"A. Whatever he delineated upon that map I accept as correct, and from my own knowledge, gleaned in the performance of my duties during a long course of years as Surveyor of the Corporation of Washington and of the District of Columbia, I find the accuracy of Mr. Boschke's map to have been demonstrated by my own work."

Rec. III, 985.

The counsel below, of the Government, himself owning the Boschke map, but, naturally, unwilling to part with it, stipulated for its production, on the hearing, in order that it might be fully consulted; (Rec. III, 986;) and this stipulation, of course, "was co-extensive with the cause."

Vattier *v.* Hinde, 7 Pet. 266.

Turning, then, to the Boschke map, we find that the tide actually covered portions of the following squares, now fronting on Water Street: Squares 270, 300, 329, 356, 390, 391, S. 415, W. 471, 472, 473, 503, 504, 506, south of 506, and south of south of 506.

Among these squares, are the three with which this brief is chiefly concerned.

If such, at a much later period, was the situation of the shore-line, it is reasonable to suppose that at the date of the

contract made between the Commissioners and Morris and Greenleaf, the river was, at least, equally near the bluff bounding the land of Notley Young.

And this supposition is reduced to certainty, by reference to the "*Grade Book*," prepared by Nicholas King, the surveyor, in 1797.*

The plats contained in this volume were admitted by consent, (Rec. IV, 1338,) but are not well placed in the Record.

They may be found, *colored, in part, in green*, in the series of plates, Rec. VI, next following the plat immediately succeeding p. 366.

They are explained in the deposition of Forsyth, (Rec. IV, 1342–1345, 1350–1360,) taken in 109 U. S. 672, but admitted by consent in the present controversy. (Rec. IV, 1388.)

The *meanders* of the Potomac along the land of Notley Young may be seen in Rec. VI, third plat from the end of the volume.

With any regard to economy or convenience, there could, from these meanders, be no method of establishing a Water Street in front of that land, with running the street, in large measure, through the water.

No difficulty exists in determining, from the evidence, the location, with reference to the former *bluff* along the river, of the Water Street boundaries, as originally estab-

* The Record contains frequent allusions to the "levels." Rec. IV, 1619, 1620, 1621, 1622, 1624–1625, 1626, 1605, 1616.

lished, of squares 472, 473 and 503, the squares with which the present brief is particularly concerned.

The course of Water Street in front of each of these squares, was, upon the Washington Map of 1797, (Rec. V, map facing p. 118,) as well as upon the Elliott Plan (Rec. I, second map after p. 324,) and still remains uniform and the same. (Rec. I, third map next after p. 324.)

And if the Water Street boundary of square 472, was always situate below the former bluff line of the river, it is not unreasonable to assume, that the Water Street boundaries of squares 473 and 503, considering the relations of these squares to square 472, were also thus situate.

But assumption is reduced to certainty, in contemplating the shore-line of "Duddington Pasture," the land of Notley Young, from which these squares were carved.

Rec. I, map next preceding p. 325.
Rec. IV, map facing p. 388.
Rec. IV, map facing p. 398.

On the southeast corner of square 472, being the northwest corner of M and Water Streets, (sometimes described by witnesses whose recollections antedated the actual construction of Water Street, as the corner of M and 7th streets,) there stands a certain brick building, known in former years as the *white warehouse*, and, at times, used as a *tavern*.

Smithson was born at Greenleaf's Point, on the Potomac, in 1814, (Rec. IV, p. 1803,) but the building, he states, was erected "long before" his birth. (Rec. IV, p. 1805.)

Wm. R. Riley, who had resided here since 1824, (Rec. IV, 1759,) was cross-examined by the Government, and answered, as follows:

"x-Q. Was there a bluff there at M street, in your early recollection?

"A. Yes, sir; there was a great bluff there on the river side of M street. This white warehouse we speak of, stood at the corner of M and 7th streets; the ground had been dug out there so as to build the house; I have gone into that warehouse, from the bluff above, into the second story of the white warehouse, the bluff was so great; the bluff was on a level with the second story of that white warehouse." (Rec. IV, p. 1769.)

Thomas W. Riley, who, also, had resided here since 1824, was cross-examined, by the Government, and answered, as follows:

"x-Q. How near did the tide come to that warehouse?

"A. I would suppose twenty feet; I never measured it, but I know it was very close." (Rec. IV, p. 1811.)

Baker, who, since 1841, had been mainly employed on "steamboat work" and in the construction of wharves, at Washington, (Rec. IV, pp. 1814–1815,) was interrogated, and responded, as follows:

"Q. You recollect, of course, the white warehouse near the 7th street wharf, do you not?

"A. Yes, sir; we call it the Powhattan House now.

"Q. Describe its situation, as you first recollect it.

"A. It was a shaky old building; it was not worth anything, scarcely; the walls were high and heavily built from ancient times, it was really crumbling down, and it would have *fell*, if it had not fallen into the hands of Page. I worked for him in the shipyard, and he occupied it as a tool-house, warehouse, and it stands on the building line of M and Water Streets, right on the corner, and the tide made up in the street alongside of it.

"Q. How near to the building did the tide come, in your recollection?

"A. It came up to the south side of the corner of the house.

"Q. Actually touch the corner?

"A. Not exactly the corner of the house; but a post stood there for years, and they used to pull sail boats up there and tie them to that post and go in the door of this house and get a drink.

"Q. You could, then, sail in a boat near enough to this house to step into the door?

"A. Yes; within ten feet.

"Q. That structure is still standing?

"A. Yes, sir; George Page fixed that house and made it what it is to-day—remodeled it."

Rec. IV, pp. 1850–1851.

Pumphrey, who had resided in South Washington, near the Potomac, since 1814, (Rec. IV, p. 1814,) was examined, and replied as follows:

"Q. Do you recollect the white warehouse, in your earliest remembrance, at the corner of what are now M and Water Streets?

"A. I do; I had a workshop there for three years, and I ought to recollect it.

"Q. Did it then stand in precisely the situation it stands now?

"A. Yes, sir; it could not move very well, unless there had been some pretty big jacks and things to lift it up.

"Q. It stands now on the building line of those two streets, does it not?

"A. Yes, sir.

"Q. What is there, to your knowledge, in and about the building to indicate that it stands on the building line? Any mark or stone?

"A. There was a corner-stone, I think, of the square right under—well, I call it the southwest corner of the building.

"Q. You have seen that stone often?

"A. Yes, sir; and it is there yet, unless they took it up since the street was fixed."

Rec. IV, p. 1815.

There can be no doubt, from other testimony, that the structure stands now where it stood from the time of its erection, (Rec. IV, pp. 1770, 1809, 1813,) and that it is situate upon the present building line of Water Street. (Rec. IV, pp. 1807, 1811, 1822, 1827, 1880.)

Each owner, as he built his wharf, filled in the street, in front thereof. (Rec. IV, 1489, 1490, 1762, 1807, 1808, 1816, 1846.)

*George Mattingly,** who came here in 1816, (Rec. IV, 1490,) and whose recollection of the water-front, in 1877, (Rec. IV, 1465,) extended back for sixty years, (Rec. IV, 1479,) declares, that, in the commencement of that recollection, there was no sign of a street toward the water side of square 472, (Rec. IV, 1478, 1479–1480,) one of the squares represented in this brief.

Part of his examination was as follows:

"Q. Was there, or not, in your earliest recollection, a street opposite any portion of square 472—on the present line of Water Street?

"A. No, sir; there was not any street at all.

"Q. When was there first, to your recollection, a street

*The depositions of Joseph H. Bradley (Rec. IV, 1423) and George Mattingly, (*Id.* 1465,) were taken in the cases reported in 109 U. S. 672, and were introduced, under objection from the Government, (Rec. IV, 1422,) in the present controversy, upon the idea of their competency with respect to *a question of public right*, the Government, not waiving its objection, (Rec. VII, 2380,) also introducing in the present controversy the depositions from those cases of William Gunton (Rec. VII, 2381) and William W. Moore, (Rec. VII, 2383,) the last two depositions being, however, *ex parte*.

This court, of course, if it deem the depositions incompetent, in whole or in part, will ignore them, accordingly.

opposite any portion of square 472, on the present line of Water Street?

"A. The first thing I ever saw there, that looked like a street, was made by old George Page.

"Q. Was he, or not, at the time of the (by error in Rec., *its*,) erection *of* (by error in Rec., *in*,) that street, claiming to be the owner of square 472?

"A. Yes, sir; he had bought the whole square?*

"Q. In erecting that street, did or did not, Mr. Page erect it at his own expense?

"A. Yes, sir.

"Q. How do you know that fact?

"A. I have known it from his saying so. When we bought the property I proposed, on the part of the Company,† to sue the Corporation, for the erection of that street; for there was an absolute law when a man makes a structure along his property, when the Corporation takes it for the use of the city they shall pay for it."

Rec. IV, 1478–1479.

Part of the examination of Mr. *Joseph H. Bradley*, testifying in 109 U. S., 672, was as follows:

"Q. Can you state when, and if so, by whom, Water Street, in front of square 472, was first made?

"A. I cannot state when or by whom it was made, but my belief is very strong that it was not made until after the breaking out of the late war, but I know, as a matter of fact, that a sea wall, stone wall, was built near the channel in the line of direction with the channel and the earth filled in where Water Street is now defined, by Mr. George Page, long before the breaking out of the war, he being the owner of part of square 472, and claiming the right to erect that wharf, as appurtenant to his lots in square 472."

Rec. IV, 1428, 1464.

And see, *Accord.*, Rec. IV, 1464, 1478, 1489, 1816, 1822, 1823, 1826, 1831, 1846.

* In 1850. (Rec. IV, 1365, 1366, 1367.) † Potomac Steamboat Company.

So, Water Street, in front of its lot 1, in square 473, and its lot 11, in square 503, was built, at its own expense, by the Potomac Steamboat Company, (Rec. IV, 1491–1492,) from which the appellants represented in the present brief (with the exception of the Washington Steamboat Company, Limited,) derive title.

Opposite its property, in square 473, the *Potomac Ferry* Company, under its charter from Congress, filled in a Water Street, at its own expense, (Rec. IV, 1853,) and the rights of this Company, as we may have seen, were acquired by the *Washington Steamboat* Company, Limited, one of the appellants represented in the present brief.

Mr. *William A. Bradley* filled in Water Street opposite his property, in square 356, (Rec. IV, 1451, 1489,) and *Lambell*, opposite square 390, or 391. (Rec. IV, 1425, 1451, 1461.)

The cross-examination of *Mattingly*, in 109 U. S. 672, was in part thus:

"x-Q. You say, that, so far as your knowledge is concerned, the streets in front of property lying on the present line of Water Street, have been made by the parties who have erected the wharves; except, perhaps, in one case. Please specify the parties who erected such streets, or parts of streets, and the dates at which they erected them.

"A. I could not specify any dates, particularly, but William A. Bradley was one of the parties; Page was another; The Potomac Steamboat Company was another, and I believe everyone on the river that built wharves, made the streets in front of them, except those recent wharves built under these Government licenses taking possession of other people's property.

"x-Q. Was it not necessary for these persons to get permits from the Corporation to build up the public street, or add to it?

"A. I do not think it was. The Corporation was very glad to have the streets made wherever they could."

Rec. IV, 1489.

Boss, who had known the river front since 1836, (Rec. IV, 1829,) upon cross-examination, was asked and responded as follows:

"x-Q. You have stated that these wharf-owners graded the streets or did what there was done in the way of reclaiming it from the water in front of their wharves.

"A. Yes, sir.

"x-Q. Do you assert that fact of your own personal knowledge?

"A. I have seen them doing it. I have seen them working at it. I will guarantee, now, if you will go along there and pick up what walls have been filled in, that you will find a block of piles decayed, and where they dug little bits from the banks of the river to mix with it."

Rec. IV, 1834.

Mr. Mahlon Ashford,* born in 1833, (Rec. IV, p. 1755,) lived, when a boy, in the immediate vicinity of the river at O street south, (Rec. IV, p. 1751,) and from 1845, or 1846, was perfectly familiar with the shore line, from the Arsenal grounds to 9th street, (Rec. IV, 1751,) or even to the Long Bridge. (Rec. IV, p. 1755.)

He remembered the wharf shown on the Washington map of 1797, opposite square 472, and the wharf, with saw-planing-mills thereon, operated by Van Riswick, opposite square 503, (Rec. IV, 1752.) These wharves and mills, he asserts, were all beyond the limits of the opposite

*A gentleman of uncommon merit, and most accurately informed upon all the titles to land in the City of Washington.

squares and had been erected by their owners, at private expense, upon land reclaimed by such owners from the water. (Rec. IV, pp. 1758–1759.)

Surely, it ought not to be admitted, that the rights of the riparian proprietor were injuriously affected by the construction of any part of this highway, at his own expense, in pursuance of the Regulation in question, and in the interest of the commerce which it was the great object of the Commissioners to promote at the seat of Government.

There are acts of the City Councils of March 8, 1850, (Rec. VII, 2337,) for repairing "the sea wall *on the Potomac*," between 10th and 13th streets west; September 13, 1860, (Rec. VII, 2342,) for "repairing the sea 'wall' on the *Potomac River*," between 11th and 13½ streets west, and of May 3, 1866, for continuing "the construction of the sea wall on the *Potomac River*," between 7th and 9th streets west. (Rec. VII, 2347.)

There are also acts of the City Councils, one, of September 27, 1869, directing a change in the grade of *Water Street* between 9th and 11th streets west, (Rec. VII, 2349,) and another, of November 12, 1870, by which *Water Street* was "to be graded and gravelled," from 7th street west to P street south. (Rec. VII, 2350.)

The substantial public improvement of the land, reclaimed from the Potomac by the wharf-owners, and designated as Water Street, was accomplished by the Board of Public Works established for this District, by section 37 of the act Congress February 21, 1871. (16 Stat. 426–427.)

As to "Water Lots" Possessing Riparian Privileges.

That what were classified as "*water lots*," by the Commissioners, were possessed of riparian privileges, was conceded by this Court, in 109 U. S. 692, though this Court there adopted, as generally accurate, the description of such lots, given in a report made in 1846, by the *Committee of Police* of the lower board of the City Councils, (Rec. VII, 2290, 2313–2314,) to the effect that such lots "were defined by metes and bounds on three sides, and were estimated, originally, in the division," afterward "in sales, and," then, "for assessment, by the front foot;" that only lots possessed of a water boundary possessed also riparian privileges, that lots bounded on all sides by land, were destitute of such privileges, and that the question of boundary was to be determined by the terms of the *deeds* held by the lot owners. (109 U. S. 692.)*

The permission granted to the owners of "water lots," under the Regulations of July 20, 1795, was a license to wharf and build out *both* into the "Potomac *and* the *Eastern Branch*."

But, by far the greater portion of the land within the limits of the Federal City, which was washed by the Potomac, was land owned by Notley Young and known as "Duddington Pasture."

Indeed, on March 5, 1795, and before the adoption of these Regulations, the Commissioners had already granted to Mr. Young a license "to build a wharf on the river Potomac." (Rec. VI, 284; Rec. VII, 2229–2230.)†

* The Supreme Court of the District of Columbia, in the present controversy, appear to have deemed the location of squares *in* the water incapable of conferring upon them any privileges of wharfing, whatever. (Rec. VII, 2536–2539; 2709.)

† The wharf erected under this license by Mr. Young was opposite part of his square 472, Washington Map, 1797. (Rec. V, map next after p. 118.)

Nor was there to be found a solitary lot opposite the Potomac, within that tract, which was not bounded towards the water, nominally, at least, by Water Street.

Some squares there were, indeed, such as in *Hamburg*, (Rec. VII, plat immediately after p. 2640,) squares 63 (Rec. III, 793,) and 89, (Rec. III, 700,) and, in that tract of the land of *David Burns*, lying between Hamburg and Goose, or Tyber, Creek, (see plat last above mentioned,) squares 129, (Rec. III, 787–788,) and 148, (Rec. III, 686,) (and, it may be, a square or two in the land of *Robert Peter*,) which might be located, according to the *Registers of Squares*, or otherwise, with boundaries on or in the Potomac.

But the squares in the Federal City which legally extended into or were bounded by the Potomac, in 1795, were far too few in number, and, in comparison with most, at least, of those 18 squares in the land of Notley Young, which were bounded by Water Street, far too ineligibly situated, with reference to depth of water,* to have rendered them the exclusive objects of the Commissioners, in such features of their Regulations as applied to that river.

For reasons somewhat analogous, it might be justly presumed, that their Regulations of 1795 were not intended by the Commissioners to embrace only such lots, or squares, on the Eastern Branch, as then legally extended into, or were then legally bounded by, that stream.

Upon the plan of L'Enfant, (Rec. VI, plat next after p. 352,) and upon the Engraved Plan, as well as the Philadelphia, (Rec. 1, map next after p. 324; Rec. V, map next before p. 77,) as the Boston (Rec. V, map next after p.

*See the relative *soundings*, though indistinct, on the Philadelphia Plate (Rec. I, map next after p. 324; Rec. V, map next before p. 77,) and, also, on the Washington Map of 1797. (Rec. V, map next after p. 118.)

120,) Plate, a well-defined street is delineated between the Eastern Branch and *all* of the squares lying nearest thereto.

The like situation, in respect to *much the larger number* of such squares, is exhibited upon the Washington map of 1797. (Rec. V, map next after p. 118.)

The interpretation of these Regulations that would exclude from their benefit the most central and convenient section of the Potomac front, and confine the commercial interests and development of the City to the scattered and occasional localities upon that front, and to those situations upon the Eastern Branch, where, from the returns of the surveyors, or otherwise, no street appeared to intervene between the water and its neighboring squares, ought to be founded upon very convincing considerations.

An attentive consideration of the terms of the Regulations, will render such interpretation impossible.

"Water lots," within the meaning of these Regulations, are, by the Regulations themselves, divided into two classes:

1. Those between which and the water, a street, under the general plan of the City, is made to interpose.

2. Those between which and the water, no street is, by such plan, required to intervene.

This division negatives, of course, the conception that "water lots," within the intendment of the Regulations, were such only as legally extended into, or were legally bounded by, the Potomac, or the Eastern Branch.

The proprietors of the first class of "water lots," when wharfing and building out, under the Regulations, were to

leave spaces for, and of the breadth of, the streets required by the general plan of the City, and, should those proprietors themselves, opposite their lots, construct such streets, the same were to be subject to their "separate occupation and use," until the public should repay the cost of construction.

But, as this feature of the Regulation imposed *no obligation* upon the proprietor to construct the street, the public might, at any time, of course, in advance of his action, proceed to such construction.

The proprietors of the second class of "water lots," were only to leave spaces for streets, 60 feet wide, at the termination of every 300 feet of made ground.

The streets in front of each of these classes of "water lots," would belong, when made, to the United States, in fee, subject to the right of private occupation and use, in the particular conjuncture, and until the reimbursement, already mentioned.

It is not to be conceived, that in the very act of licensing the erection of wharves, the Commissioners, though requiring the proprietors of "water lots" *to leave spaces for an intervening street*, wherever the general plan of the City required it, meditated, at the same time, that a compliance with that requirement would be fatal as well to the distinctive character of those lots, as to the exercise of the license thus emanating from official hands.

Bailey *v.* Burgess, 11 R. I. 330.

The situation, upon the theory of the Government, would be reduced, then, to this:

A lot *originally*, bounded towards the water, by a street owned in fee by the United States, could be no "water lot," but a lot between which and the water no street

originally intervened, as it answered, in the first instance, the description of a " water lot," would retain that description, *when subsequently bounded* towards the water by a street so owned.

The truth is, that neither in common acceptation, nor in the early history of the Federal City, is the term "*water lot*," found to import the legal location of such a lot wholly or partly in the water, any more than the word "*water street*" implies that the street is wholly or in part submerged.

It is to be remarked, that the draft of the Regulations submitted to the President by the Commissioners, in their communication bearing date the 24th of July, 1795, contained the words following : " Proprietors of *property lying on the water*, (Rec. VI, 182,) to be permitted," &c.

The language of the Regulations as ultimately adopted, is "All the *proprietors of water lots* are permitted," &c. (Rec. VI, 180.)

This difference of phraseology cannot be regarded as the result of accident.

The license granted under the draft submitted to the first President, as well as under the perfected form of the Regulations, was subject, as we have seen, to the restriction of leaving spaces for streets, wherever the general plan of the streets in the city required it, and in conformity with such plan.

And, among the streets contemplated and required by the general plan of the city, prevailing in 1795, was one passing along the banks of the Potomac. Moreover, all of the various squares laid out along the river, within the boundaries of the land of Notley Young, though such of those squares as might fall to the public were expressly

sold by the Commissioners, with the "*privilege of wharfing annexed thereto*," were yet, according to the returns made by the surveyors, as early as December 24, 1793, bounded by Water Street.

Other property in the city might be found in like situation.

We have seen, that, on the date last mentioned, and with reference, no doubt, to the contract then made by the Commissioners with Morris and Greenleaf, certain squares in that land were returned bounded by *Water Street*, though previously returned bounded by the *Potomac*.

And the uniformity in boundary affected by these alterations of the returns, was emphasized and confirmed, in the course of the Proceedings of the Commissioners, on June 22, 1794, as follows:

"The commissioners direct that the survey and returns made of the part of the city on Mr. Young's land adjoining the Potomac, leaving Water street according to the design of the plan of the city, be acted on instead of the returns made by Major Ellicott, in some instances bounded with and in others near the water." (Rec. IV, 1595; VI, 281.)*

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*The inattention of counsel below, counsel on the present Brief, has suffered *a title*, the most inaccurate, to be given, in one instance, to this entry. (Rec. VI, 281.)

For *this*, the explanation—not the excuse—may be found in the use made, in the present controversy, of a particular *Appendix*, (Rec. IV, 1337,) to one of the Briefs before this Court in 109 U. S. 672, without previous critical examination of that Appendix, which is here *Exhibit M. R. No.* 8, (Rec. IV, 1337,) and embraces, in the present record, about 54 pages. (Rec. VI, 261-315.)

Some like inattention, especially as to the city officials, (Rec. VI, 311-312,) has been given to the other portions of that document, but these further slips, where of moment, have all been corrected, it is believed, in the Brief, by reference to original sources of information.

The inconvenience and uncertainty that must arise, under such circumstances, from confining the Regulations strictly to "*property lying on the water*," could scarcely have escaped observation during the period in which, as we have seen, the subject was considered by the first President and the Commissioners.

On the other hand, the term "*water lots*" was of easy and familiar application to the various squares in the city, possessing the privilege of wharfing.

It was, doubtless, to such reflections that we owe the language finally adopted by the Commissioners in the Building Regulations of July 20, 1795.

Mr. *Jos. H. Bradley*, under objection, on his examination-in-chief, testified thus:

"Q. State, if you please, Mr. Bradley, what, since your earliest recollection of the City, has been commonly regarded as a *water lot*, in contradistinction from any other lot.

"A. From the time that I have any recollection of the subject of water lots, I believe that in common acceptation, it meant lots fronting on *a* (by error in Rec. IV, 1438, *o*,) street, whether both sides of the street were defined or not, but where there was no fast land between the outer or river boundary of the street, and the river opposite those lots.

"Q. State whether or not such acceptation was your own, and whether it was practically regarded in the City in business transactions.

"A. It was certainly my own, and so far as I know or have reason to believe, it was practically acted upon in business transactions."

Rec. IV, 1438–1439.

On cross-examination, the same witness continued as follows:

"Q. Please state the distinction, if any, made by you between water privileges and wharfing privileges.

"A. I have never been aware of any distinction. They were used as convertible terms." (Rec. IV, 1460.)

The declaration made by the Commissioners on the 18th of February, 1795, to the effect that Morris and Greenleaf were unauthorized to make a selection of water lots *in square W. of* 4, on Rock Creek, nor, indeed, of "*any water lots not expressly included by the terms of their contract*," would seem to negative the assumption that, in the judgment of the Commissioners, that contract conferred no right of selection *in any property* to which the idea of *water lots* could be properly applied. (Rec. IV, 176.)

Yet, as has been frequently seen, the 18 lots nearest the Potomac, in the land of Notley Young, in which land alone Morris and Greenleaf were entitled to select public property possessing the privileges of wharfing, were all bounded by Water Street, as early as December 24, 1793.

(1) On the 21st of February, 1795, (Rec. IV, 177,) the Commissioners, while denying to Morris and Greenleaf the right of selection in *other water lots*, by reason of the terms of exclusion contained in the contract of December 24, 1793, (Rec. VI, 146,) expressly declares that Morris and Greenleaf became, under that contract, the purchasers of 6,000 lots, "*many of which were, by express stipulation, water lots.*"

The *water lots* thus acquired by Morris and Greenleaf, if not topographically under water, were, nevertheless, *water lots in the intendment of the contract*, and by the "*express stipulation*" *thereof.*

This stipulation, it is apparent, can refer to none other than that contained in the *proviso* of the contract, whereby Morris and Greenleaf, though excluded generally from a selection of water lots, were, nevertheless, declared entitled to the public lots *in Notley Young's land*, "and, of course, to the privileges of wharfing, annexed thereto." (Rec. VI, 146.)

(2) Confirmation of this view would be supplied, if necessary, by the following opinion, expressed by the Commissioners on the same occasion: "We think the contract, in explicit terms, excluded these gentlemen from a selection in *any water lots except in Notley Young's property and the canal*," and by that announced by the Commissioners on November 29, 1796: "Morris and Greenleaf, by their contract for the purchase of lots, were excluded from the selection of *certain* water lots."

Rec. VI, 288.

(3) In his communication to the Commissioners, of February 28, 1799, Surveyor *Dermott*, in answer to the following inquiry:

"What portion of the public water squares or lots on navigable waters were sold before the 1st of January, 1798?"

—Says:

"All the public part of *water property* from square 233 to square south of 506, was disposed of to James Greenleaf, in his contract of December 24, 1793."

The aggregate sales up to January 1, 1798, Dermott adds, in effect, "I consider to be about one-half of the

public water squares in the City of Washington, as to quality and quantity." (Rec. VI, 216.)

(4) Nicholas King, the surveyor, in a letter to the Commissioners, dated December 3, 1796, expressly refers to "*The water property on the Potomac, from the point upwards to the President's garden.*" (Rec. VI, 196.)

And on March 8, 1797, he transmits to the Commissioners, a series of plans "of that part of the City which lies in the vicinity of the water, *and includes what is called the water property*, from the confluence of Rock Creek with the Potomac to the public appropriation for the Marine Hospital on the Eastern Branch." (Rec. VI, 199.)

(5) The narrow limits assigned to "*water lots*," by the Government, in the present controversy, are in some contrast with the opinion of Attorney-General Lee, communicated to the President on the 7th of January, 1799.

Reference is made in that opinion to "*water lots on the Potomac River*," as well as on *Rock Creek* and the *Eastern Branch*. (Rec. VI, 293.)

And "*as to the water lots*," it is there said, "*their extent and length is upwards of eight miles*," and that "to define universally the rights, manner, and distance of wharfing appurtenant to each lot, would be a work of difficulty and expense." (Rec. VI, 293.)

(6) On February 12, 1795, Col. *Forrest* had made to the Commissioners *an offer for the water front* of part of square West of 4, "beginning at high water mark," agreeing at the same time, "*to a street being laid on or near the front,*

if thought necessary," and that such street might "be *thirty or forty feet wide.*" (Rec. VI, 171.)

This offer was accepted by the Commissioners, (Rec. VI, 171,) but it cannot be supposed it was considered either by themselves, on the one hand, or by Col. *Forrest* on the other, that the interposition of the street would divest the square of any privileges of wharfing that had previously been acquired by purchase from the Government.

We have already repeatedly noticed, that the squares fronting on Water Street, between the Long Bridge and the Arsenal, were treated by the Commissioners as possessed of the riparian privilege.

A similar recognition appears in the proceedings of the Commissioners, when dealing with squares adjacent to the Eastern Branch.

In that section of the city, there was, besides a Water Street, a street bordering the river and known as *Georgia Avenue.*

Both of these streets occupy, with reference to the lots on the Eastern Branch, the precise relation that Water Street bears to the squares opposite thereto, on the Potomac, from the Long Bridge to the Arsenal.

1. On May 24, 1795, the Commissioners granted to *James Barry,* license to build a wharf opposite a certain lot in square No. 662, and, also, opposite certain lots in square No. 708. (Rec. VI, 284.)

Yet these squares were bounded, the former, by survey returned June 15, 1793, on the "*Southeast by Water Street,*" (Rec. VI, 244,) 385 feet and 10 inches, and the latter, by survey returned June 17, 1795, on the "South by R Street *South.*" (Rec. VI, 245.)

2. On October 3, 1795, *James Barry*, representing that "*Georgia Avenue* meets the water at *Third Street*, and can only begin again at the other side of the water," requests permission of the Commissioners, to erect a store or buildings, "agreeably to the regulations of the water property of square 771, without adverting to the imaginary direction of Georgia Avenue," which ran across his wharf, "and would totally render useless the said wharf;" and that he was induced to take this precaution, lest some litigant should thereafter assert, "that so much of my wharf is public property, as Georgia Avenue runs across it; although it is self-evident that Georgia Avenue *is only practicable and serviceable to Third Street.*" (Rec. VI, 188–189; Rec. VII, 2231.)

On October 5, 1795, the Commissioners reply as follows:

"We think, with you, that an imaginary continuation of Georgia Avenue, through a considerable depth of tide water, *thereby cutting off the water privilege of square 771 to wharf to the channel, too absurd to form a part of the plan of the City of Washington;* that it never was a part of the plan that such streets should be continued through the water, and that your purchase in square 771, gives a perfect right to wharf to any extent, in front or south of the property purchased by you, not injurious to navigation, and to erect buildings thereon, agreeable to the regulations."

The Commissioners add in P. S.:

"We have ordered your letter and our answer to be entered at large on our books, for the more perfect security of your title, as you seemed to wish it."

Rec. VI, 189.

The continuation of *Georgia Avenue*, opposite square 771, in 1795, was not more "*imaginary*" than the contin-

uation of Water Street, in 1793, opposite some of the lots carved from the land of Notley Young, since, as late as 1797, the fronts of some of those lots towards the river, were, as we have already seen, *located under water.*

This Court, in 109 U. S. 688–699, referring to such the communication of Barry and the above reply thereto of the Commissioners, remark:

"It is plainly to be inferred from this, that if, as was the case of Water Street, the street was laid down on the map as a continuous street abutting on the river, and called for as the southern boundary of the lots fronting on it, it would have been regarded by them (the Commissioners,) as forming part of the plan of the city, 'thereby cutting off the water privilege' from lots between which and the river it intervened."

Yet, it is shown by the present record, that such, precisely, *was* the situation of Georgia Avenue, both on the Philadelphia Plate, (Rec. I, map next after p. 324; Rec. V, map next before p. 77,) and on the Washington map of 1797. (Rec. V, immediately after p. 118.)

And square 771 was returned by Freeman, the surveyor, on November 14, 1795, as bounded on "the south by Georgia Avenue, one hundred and ninety feet two inches." (Rec. IV, 1413.)*

3. Square 802, according to its survey and the books of

* On April 12, 1797 (after the completion of the Washington map of 1797,) a new location was thought to have been found necessary for this square, with reference to the canal, (Rec. IV, 1414,) but counsel is unable to find that any alteration was ever made in the Georgia Avenue boundary of the square.

the Commissioners, is bounded "*Southwest by Georgia Avenue*," 371 feet 6 inches. (Rec. VI, 247.)

Yet as early as March 23, 1794, the Commissioners were themselves "in treaty for the public *water lots*," in that square. (Rec. VI, 280.)

And on March 17, 1807, lot 6, in this square, was conveyed by *Thomas Law* to *Joseph White*, by deed, one call of which was, "To Georgia Avenue, and thence with the line of said Avenue, 104 feet 5 inches, to the beginning, the said lot to be continued and to run to the channel of the Eastern Branch river, together with all and singular the rights, privileges and appurtenances and waters thereto belonging." (Rec. IV, 1380.)

4. In their communication addressed to Morris and Nicholson, on March 16, 1797, the Commissioners expressly refer to square No. 853 as "being *water property*," for which certificates had been duly granted. (Rec. VI, 201.)

Yet, on September 4, 1793, a survey had been returned of that square, bounding it, on the "*east by Canal Street*," 440 feet 6 inches, and on the "*southwest by Georgia Avenue*," 149 feet 7 inches. (Rec. VI, 247–248.)

5. By survey returned September 4, 1793, square 883 is bounded, "*west by Canal Street*," 319 feet 9 inches, and "*southeast by Georgia Avenue*," 544 feet 11 inches. (Rec. VI, 248.)

But in Division Book No. 1, it is noted: "*The westernmost part of this square*, viz: 373 feet rectangular water front, was considered as possessed *of water privilege*." (Rec. VI, 251.)

And as late as January 27, 1800, the Commissioners

continued to designate the same square as "*water front.*" (Rec. VI, 221.)

6. On May 15, 1798, the Commissioners agree to transfer to *Charles Minnifie*, certain lots in square 1067, "with the *right of wharfage opposite thereto* on the Eastern Branch." (Rec. VI, 206.)

By the survey of this square, returned on November 14, 1793, it is bounded on the "*southeast by Water Street,*" 257 feet. (Rec. VI, 253.)

Thus it plainly appears, that, in several instances, prior to June 25, 1798,* the Commissioners conceded the annexation of the riparian privilege to the opposite squares, notwithstanding the intervention of a street, according to the returns of the surveyor.

Nor are examples wanting of a similar recognition on the part of the Commissioners, at a subsequent period.

1. On October 3, 1798, the Commissioners, in a letter to *General Washington*, after acknowledging the receipt of his two checks, the one in their own favor, and the other payable to Mr. *Carroll*, observe that they "have directed the proper conveyances to be prepared" for his purchases, and that a deed from Mr. *Carroll* has been already executed. They add: "Upon examining the sale book, no doubt is left of your being clearly entitled to the water lots, agreeably to the plan we received from you." (Rec. VI, 208.)

On the same day, the following entry occurs in their proceedings: "Certificate in fee granted to General Washington for lots 5, 12, 13 and 14, in square 667," three lots in square

*This date will become important, in another connection.

E. of 667, and two lots in square 21, "and delivered to Dr. Thornton." (Rec. VI, 205; see *id.* 163.)

On October 4, 1798, the Commissioners, in a letter to General Washington, say: "Your deeds from Mr. Carroll and the Commissioners are executed and delivered to Dr. Thornton, to be handed to you." (Rec. VI, 208.)

Yet, by survey returned June 15, 1793, square 667 is bounded "southeast by Water Street," 409 feet 5 inches. (Rec. VI, 246.)

And, by survey returned June 13, 1793, square E. of 677 is bounded "southeast by Water Street," 409 feet 5 inches.

Indeed, as early as January 5, 1795, the Commissioners had mentioned this latter square as one "with the water privilege East of the same." (Rec. VI, 169.)

In the "Schedule of Property" comprehended in his will, General Washington, under the description of lots in the City of Washington, mentions "Nos. 5, 12, 13 and 14, the last three *water lots** on the Eastern Branch, in square 667, containing together 33,438 square feet, at 12 cents." (1 Spark's Writings, 582.)

In a note to this schedule, he adds:

"Lots 5, 12, 13 and 14, on the Eastern Branch, are advantageously situated on the water; and, although many lots much less convenient, have been sold a great deal higher, I will rate these at twelve cents the square foot only."

1 Spark's Writings, 585.

2. On December 5, 1798, the Commissioners agree to sell *George Blagden*, Lot 2, in square east of square 1025, at $10 "per foot *on the water*." (Rec. VI, 210.)

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*A blunder is imputed to General Washington, in thus describing these lots, in the Report made in 1846, by the *Committee of Police*, of the lower board of the City Councils. (Rec. VII, 2300.)

By a survey returned of this square on November 7, 1793, it is bounded on the "Southeast by Water Street," 513 feet 9 inches. (Rec. VI, 253.)

3. On October 24, 1798, two of the Commissioners (the third, Mr. Thornton, protesting, Rec. VI, 291,) communicate with *Charles Minnifie & Co.*, as follows: "We will take for lot 1 in square 1080, five pounds per foot, *water front*." (Rec. VI, 209.)

By a survey of this square returned November 21, 1793, it is bounded on "the southeast by Water Street," 104 feet 1 inch. (Rec. VI, 253.)

4. In the acquisition by the Government of a site for the *Navy Yard*, a further illustration is afforded, as already explained, of the same principle.

Mr. *Prout* was owner of an undivided moiety of square 883. (Rec. VI, 218.)

Mr. *Carroll*, who had been one of the first Commissioners, was also interested in the same square, as well as in other property in the vicinity thereof. (Rec: VI, 218.)

On August 27, 1799, Mr. Carroll informs the Commissioners that he is willing to relinquish his moiety in this and another square, for the object the Commissioners have in view, on receiving in exchange "the same proportion of *other water property*." (Rec. VI, 218–219.)

And on September 18, 1799, Mr. Prout agrees to give up his claim in square 883, for the use of the *Navy Yard*, and receive compensation for so doing, either by taking "*other water property* in exchange, on the Eastern Branch," or by being reimbursed his purchase money with interest.

Rec. VI, 219; see 1 Am. Stat. Pap. [Miscel.] 226.

On the same day, the Commissioners inform Mr. *William Marbury*, the Naval Agent, that Prout had just then written them of his willingness to dispose of his moiety of square 883, though Mr. Carroll, on August 27, 1799, had "signified his consent to relinquish his moiety of square 853 and 883 to the Commissioners, and accept *other water property* of equal value, in lieu thereof," and the Commissioners add:

"The other squares you mention, being under water, are considered as appertaining to the above mentioned water squares. We will reserve the squares No. 853 and 883, for the use of the United States, and presume the Secretary of the Navy will apply to the President of the United States, for such instructions as he may think necessary to secure the title of them for the use of the Navy Yard." (Rec. VI, 218–219.)

On November 1, 1799, the Commissioners announce to Mr. *Marbury*, their conclusion that *Prout* and *Carroll* have consented to relinquish their interests, in these squares, for the use of the Navy Yard, and that they themselves are now prepared to make conveyance for the same object. (Rec. VI, 220.)

On November 12, 1799, the Commissioners report to the *Secretary of the Navy*, that Mr. *Carroll*, after considerable delay, has "informed us of *such water lots as he was willing to receive in lieu of those relinquished for the Navy Yard*." "These lots," they remark, "he was told would be conveyed whenever he pleased." (Rec. VI, 220.)

On January 27, 1800, the Commissioners note their execution of a Deed of Exchange, by which certain lots in squares 826, 611, 610, and north of square 853, are conveyed to Mr. Carroll, for his "part of upland property and *water front* in squares 883 and 884." (Rec. VI, 221.)

It has already been shown that squares 853 and 883 were bounded "*East by Canal Street*," and "*Southwest by Georgia Avenue.*"

Yet, these squares were acquired for the *Navy Yard*, by the Government, as "*water property.*"

So, also, the property conveyed by the United States, in exchange for these squares, was treated as "*water property*," notwithstanding the intervention of a street.

5. Square 826 is thus noted in Division Book No. 1: "The south front of this square is considered *as having the water privilege from Georgia Avenue to the channel*, and has been equally divided between the public and proprietors." (Rec. VI, 251.)

Yet, according to the return of this square, made September 3, 1793, it is bounded on "*the South by N Street South*," 175 feet, and on "the East, by 5th Street East," 365 feet 8 inches, nor is *Georgia Avenue* mentioned in that return. (Rec. VI, 247.)

6. Square 611 is thus noted in Division Book No. 1: "The south front of this square is water property on South V Street, fronting 335 feet thereon." (Rec. VI, 252.)

By the survey of this square, returned June 6, 1793, it is bounded on "*the South by V Street South*," 335 feet. (Rec. VI, 244.)

7. A similar boundary, under a return of the same date, is given to square 610. (Rec. VI, 243; Rec. IV, 1415.)

Reference may well be made, in this connection, to the accounts of their transactions rendered, from time to time, by the Commissioners to the President.

For if the "water property" at the City of Washington, extended, as was supposed by the *Attorney General*, in 1799, "*upwards of eight miles*," and embraced, in 1796, according to *Nicholas King*, lots "from the confluence of Rock Creek with the Potomac, to the public appropriation for the Marine Hospital on the Eastern Branch," the books of the Commissioners must have borne to the credit of the Government, at least one-half of this property, if, at the same time, it be true that the United States failed to part with their title to lots of this description.

Yet so extensive, in fact, were the transfers by the Government, of the "water lots," which it had acquired, on division, from the original proprietors, that subsequently to the year 1795, the Commissioners do not appear to have claimed or reported, on behalf of the United States, an aggregate frontage of as much as 4,000 feet of water property, within the city.

In connection with a letter from Commissioner White to his associates, of December 24, 1795, and enclosing the draft of a communication to be submitted by the Commissioners to the President, appears a memorandum importing that the Commissioners then retained, on public account, "3,500 feet front of water lots." (Rec. VI, 191.)

On January 21, 1796, it was represented by Commissioner White, to a Committee of the House of Representatives, that the "water property" held at the Federal City by the public, extended 3,500 front feet, and was held at $16 per front foot.

1 Am. St. Pap. [Miscel.] 143.

As the work of laying out the city advanced, the frontage of public water lots appears to have somewhat increased. For, in their memorials to the President, of November 25, 1797, and February 23, 1798, respectively, we find a report

from the Commissioners, stating that the public property in their hands "consists of 1,709 building lots, in choice squares, from which the purchasers of 6,000 lots were excluded in their selection," *and* "*of* 3,890 *feet front on navigable water*, and of 3,478 building lots in other parts of the City, from which those gentlemen were likewise excluded."

Rec. VI, 202–203.

Still later, however, the effect of sales appears to have greatly diminished even the figures submitted by Mr. White, in 1795.

On January 26, 1801, the Commissioners represent to the President, that they still have on hand 4,682 lots, exclusive "of lots which bind on navigable waters. These form fronts to the extent of *two thousand and forty-three feet*, and are *generally* sold by the foot front," and would produce $25,979.24 at $12.71 per front foot, the average price of lots binding on navigable waters, sold since the guarantee law of May, 1797.* (Rec. VI, 225.)

This would indicate that, at the date of these representations, the Commissioners had on hand but 2,044 feet front on navigable waters.

In the same communication the Commissioners, referring to sales already made of lots lying upon navigable waters, remark:

"It is to be observed that most of these lots were sold at periods remote from the time when profit could be expected to arise from them, and many of them at reduced prices, in consequence of covenants to build thereon," and that "though it may be admitted that the lots heretofore sold are, on an average, better than those which remain for sale,"

* By *error*, for 1796. (1 Am. St. Pap [Miscel.] 221.) The law intended, is Act Congress, May 6, 1796. (1 Stat. 461; Burch's Dig. 227; Davis' Laws, 117.)

yet they still hope to be able to realize the difference in value, by reason of the improved circumstances of the city. (Rec. VI, 225.)

With these representations concur those in the memorial addressed by the Commissioners to the President, on December 5, 1801. (Rec. VI, 227–228.)

And from the report made by Register *Nourse* to Congress, on January 18, 1825, it appears that on the 8th day of May, 1822, there were only *eight* pieces of water property belonging to the Government. (Rec. IV, 1415.)

The plan proposed by William Elliott, in 1835, and, in 1839, adopted by the City Councils and approved by President Van Buren, is entitled, "Plan of Part of the City of Washington, Exhibiting the *Water Lots* and Water Street, and the Wharves and Docks thereon, *along the Potomac*, from E to T Streets South."* (Rec. I, second plat next after p. 324.)

In the license granted on October 15, 1794, by the Commissioners of the District of Columbia, to the Upper Potomac Steamboat Company, one of the appellees in 109 U. S. 672, (Rec. IV, 1336,) to use "the dock at the western end of M street southwest," it is provided that the limits of such dock shall not "extend beyond the *water lot* on which the said M street abuts, on the plan of the City." (Rec. VI, 139.)

The "*water lot*" here intended, could be, of course, no other than square 472.

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*That is, *along the Potomac*, from the Long Bridge to the Arsenal grounds, before enlarged by purchase, under act Cong., March 3, 1857, (11 Stat. 202.)

In the wharfing licenses, though void, granted by the Chief of Engineers of the Army, he describes, in that of February 11, 1881, to *Sheriff*, (Rec. I, 131, 132,) lot 4 in square 473, as a "*water lot*," in those of June 27, 1883, to *Church*, (Rec. I, 233; Rec. IV, 1418,) and to the heirs of *Evans*, (Rec. III, 1038, 1039,) parts of square S. 415, as *water lots*, and in that of July 25, 1884, to Creveling, (Rec. IV, 1420,) parts of square 233, as *water lots*.

As to "Water Lots" being Such only as were Sold by the Front Foot.

It is freely conceded by the appellants in the present brief, that, "at an early period in the history of the city, it became the custom of the Commissioners to dispose of "Water Lots," by the *front* foot, and not by the *square* foot, and that this custom continued to prevail, from the time of its adoption.

Yet, it can require but slight familiarity with the present record, to discover *that no sales of water property had been made by the Commissioners, prior to the contract of December* 24, 1793, by which they parted with the public lots in the land of Notley Young, "*and, of course*," the "*privilege of wharfing annexed thereto.*"

Under this contract, Morris and Greenleaf became the purchaser of 6,000 lots, (averaging 5,265 square feet, each,) at the rate of £30, Maryland currency, or $80, per lot, the price, in the aggregate, being $480,000.

The five squares in the land of Notley Young, which fell, on division, to the public (Rec. VI, 149,) and were embraced in the certificate granted to Greenleaf by the Commissioners, on October 18, 1794, (Rec. VI, 151–152,) were Nos. 270, 300, 473, 503, 504, embracing about 594,798

square feet, (Rec. VI, 149,) or something less than 113 lots, standard by the contract, and, if we include the 6th Street front of square 503, about 1,966⅔ feet front, towards the Potomac, (Rec. VII, 2141, 2142, 2148, 2149–2150.)

Adopting the terms of the contract, the price of these squares would be about something less than $9,040.

The price of the squares, if sold by the front foot, would be about $31,466.

But that Morris and Greenleaf were to become purchasers, in a single transaction, of 31,509,000 square feet of ground, (Rec. VI, 145,) would constitute a substantial inducement to the uniform rate at which they were to acquire the public lots in the land of Notley Young, whether upland or otherwise.

And it was well observed of this sale, by Mr. Chief Justice Marshall, at February Term, 1810:

"In consideration of the magnitude of the contract, the lots would, according to the ordinary course of affairs, rate lower than in cases of a few sold to individuals."
O'Neale *v.* Thornton, 6 Cranch, 69.

Besides, as has been already seen, the *necessities of the times*, and the covenants *for building*, on the part of the purchasers, exerted very important influences upon the price as established by the contract.

1. The earliest instance of the adoption of the *front foot*, as the unit of measurement, appears in the proceedings of the Commissioners of April 15–24, 1794, when they sold to Dr. *Stewart*, a certain lot in square No. 63, (Rec. III, 793,) "containing 51 feet eight inches front on *Water Street*, at 25s. current money per front foot." (Rec. VI, 282.)

2. The next example is contained in an offer made to the Commissioners, on April 25, 1794, by *James Greenleaf*, to pay "five pounds per foot *for the water fronts*," in three lots in square 979, and £200 per lot, for the three *water lots* in square 771, and the three water lots in square 802. (Rec. VI, 281.)

3. On July 11, 1794, *Greenleaf* further offers to purchase *certain* lots in square 667, containing 199 feet front, at £6 current money, per foot. (Rec. VI, 165.)

Yet, this square, according to the survey returned June 13, 1793, was bounded "*southeast by Water Street.*" (Rec. VI, 246.)

4. On November 7, 1794, the Commissioners express their willingness to sell certain "water lots" to General *Stewart*, at "16 dollars the foot in front." (Rec. VI, 167–168, 282–283.)

5. And to the same gentlemen, three days later, they remark, that square No. 2 "contains *at the termination of the wharf*, 317 feet. This is to be paid for *by the number of feet in front*, but it includes square No. 7, containing 15,444 square feet, not taken into any other calculation." (Rec. VI, 283.)

These, however, are, perhaps, the only sales of public property which appear to have been effected by the *front foot*, prior to December 13, 1794, when the Commissioners informed Mr. James Barry that their terms of sale were "£6 per foot *on the water front.*" (Rec VI, 168–169.)*

Agreeable to this information was the letter of the Commissioners to the President, on January 29, 1795:

"Our sales of lots, *in most late instances*, from the water,

* On December 18, 1794, the Commissioners express their willingness to sell, at the same price, certain water lots to General Stewart. (Rec. VI, 169.)

have been as high as 100 guineas for a standard lot, and on the water, at £6 the front foot." (Rec. VI, 170.)

And, to the Secretary of State, on February 21, 1795:

"In *any late instances*, or since September last, no water lots have been sold at less than £6 per front foot." (Rec. VI, 177.)

And to Thomas Johnson, on March 4, 1795:

"We have adopted the foot square as the best way of selling lots *other than water lots*, and we do not wish to vary from it." (Rec. VI, 178.)

Thus, it plainly appears, it was not until *Morris* and *Greenleaf* had become the purchasers of the public portion of Notley Young's land, "*and, of course*," "*the privilege of wharfing annexed thereto*," that water lots began to be sold by the Commissioners, *by the front foot*, and at an enhanced value.

And it was, doubtless, in consequence of the extensive sale made to Morris and Greenleaf, that the water lots remaining in the hands of the Commissioners, began to assume a peculiar value, and to require a special standard of measurement.

The Government will not, of course, contend that change was at any time made by the Commissioners, in the price for standard lots, in the land of Young, sold under the contract of December 24, 1793, by the Commissioners to Morris and Greenleaf.

And is that contract to be now interpreted, in the light of measures first adopted by the Commissioners, four months after its execution, and adopted for the purpose of balancing the *depletion occasioned, in eligible public water lots, by the provisions of the contract itself?*

The record contains no intimation whatever, (except—if exception exist—in manner below, from Dermott,) *that the annexation of the privilege of wharfing to any of the lots laid off from the land of Young, was ever, at any moment, controverted or doubted, either by public authority, or by individuals, from December* 24, 1793, *down to the brief and ineffectual agitation conducted by Peter Force, in* 1835, *more than* 40 *years after.*

The confused and erroneous suggestion of *Dermott*, is found in his responses, on February 28, 1799, (Rec. VI, 210,) to certain inquiries addressed to him by the Commissioners.

To their question, whether he knew any instance where the right of wharfage in the city, had been claimed, or exercised, in such manner as to occasion, or be likely to occasion, dispute, he replied:

"*None from my own knowledge or any document wherein I could place any confidence.** The Commissioners, in 1793, when dividing Carrollsburg and Hamburg, had the subject of wharfing under consideration. There were only two places where any difficulty *could* arise, against which every precaution was taken. The one place was square south of 744. * * *

The next place where there *might* be a difficulty, was from squares 391 to 472. Had it been in the hands of the Commissioners, they might make provision for it, by leaving one or more squares on the internal curve there made, without water privileges, and then sell the others afterwards, some to have a south privilege of wharfing and some a west

*The question itself, and the only feature of the answer directly responsive to it, related not to the *existence* of the right, which, in the abstract, was not denied, but to conflicts arising from the manner in which the right, had been, in practice, exercised, or claimed to be exercisible.

one.* But Mr. *Notley Young, claiming this part principally for his improvements*, and which has since been assigned to him on that account, it was considered that no difficulty could arise, as the whole of that was likely to be in his possession, and none of it entitled to water privilege by *contract* but *must be by law;* therefore he may do as he pleases in selling." (Rec. VI, 216–217.)

To this, indeed, it is also added by *Dermott*, with some apparent contradiction, that in "another point of view the business was *considered, but not decided upon at the time.*" Young had obtained the squares for his improvements at the rate of £12½ per acre. "The question was, if he was entitled to the water privileges. It *seemed*, at the time *to be considered in the negative*, but this much was positive—that there was sufficient in the power of the Commissioners to make all things easy, and not leave it liable to dispute hereafter." (Rec. VI, 217.)

This representation, if not wholly unintelligible, is, obviously, wholly without value.

If the squares retained for improvements "must," "by law," if not "by contract," be entitled to water privileges, and the contrary, "was not decided" by the Commissioners, it is impossible to conjecture how, or to whom, "*it seemed*" "*to be considered*" that no such privilege existed.

And *Dermott*, in reply to an inquiry as to the position of the public water squares, or lots on navigable waters, sold prior to January 1, 1798,—had already responded,—

"The public water property from squares No. 2 to 10, inclusive, * * * All the public part of *that range of water from square* 233 *to square south of square* 506, *was dis-*

*This conjecture is sufficient to show, that, in the opinion of Dermott, the privileges of wharfing *might* belong to squares situate on the north side of Water Street.

posed of to James Greenleaf, in his contract of the 24th of December, 1793." (Rec. VI, 216.)

Of the three squares particularly represented in the present brief, squares 473 and 503 were, as we have seen, embraced in the contract of December 24, 1793, and square 472, it is apparent, was never claimed by, nor assigned to, Notley Young, "*for his improvements.*" (Rec. VI, 201–202, 258; VII, 2147, 2244.)

EARLY CLAIM AND EXERCISE OF THE RIGHT OF WHARFING, IN CONNECTION WITH SQUARES 472 AND 503, TWO OF THE THREE SQUARES PARTICULARLY REPRESENTED IN THE PRESENT BRIEF.

It belongs to a subsequent chapter, to bring into associated prominence, the long and continuous claim and exercise of riparian rights, in connection with lots in the land of Young, fronting on Water Street.

But the concurrence of opinion between the Commissioners and the owners of squares 472 and 503, in the land of Young, in respect to the annexation of the wharfing privilege to such squares, was expressed at so early a period and in a manner at once so interesting and conspicuous, that the subject may be thought to fall, with convenience, in the line of our present inquiries.

1. As to square 472.

Under the authority "to license the building of wharfs," contained in Sec. 12, of the Act of Maryland of December 19, 1791, (Burch's Dig. 223; Davis' Laws, 70,) the Commissioners, on March 5, 1795, granted to *Notley Young*, license to erect a wharf on the Potomac, (Rec. VI, 284;

VII, 2229–2230,) and, under such license, and opposite square 472, which had previously fallen to him on division, (Rec. VI, 150, 258; VII, 2147,) he constructed a wharf substantially where now is the wharf shown opposite that square, on the Washington Map of 1797, (Rec. V, immediately after p. 118,) and, after the lapse of 103 years, continuing, by representation and enlargement, in the structures designated as the "*Potomac Steamboat Co. Coal Yard*," (*built on piles,*) the "*Shed*" (also, so built,) and the "*Potomac Steamboat Co. Wharf*"—on Exhibit M. R. No. 4. (Rec. I, third plat after p. 324.)

2. As to square 503.

(*a.*) Greenleaf, on May 13, 1796, (Rec IV, 2036,) had conveyed this square to Morris and Nicholson, who, on November 9, 1796, conveyed therein, unto one *Bickley*, "a certain water lot," answering, except in its boundary towards the river, the description of what is now lot 12, in this square, (Rec. VI, 260; VII, 2149,) and extending, by its width, "*to the water of the Potomack*, or so far as the plan of the City will allow, with the *right of Wharfing according to the rules of the City.*" (Rec. IV, 2038–2039.)

(*b.*) On September 30, 1796, Nicholson, in a letter to the Commissioners, had said:

"In a late division of property with Mr. Morris, the wharf at Anacostia Point hath fallen to me. I also own another wharf at the end of square 1001,* built at my expense, by Louis Deblois, Esq. In the regulations aforesaid† it contained properly an inhibition that wharves shall not extend into or injure the canal. I find it necessary to apply

* Should have been *S. of* 1001. (Rec. V, third Plat after p. 120.)
† Building Regulations of July 20, 1795. (VI, 180; VII, 2230.)

to you, to appoint some officer who shall examine and report to you the state of these wharves, whether they be conformable to your regulations, which report, if in the affirmative and adopted by you, stating the wharf and its situation (in which, perhaps, you may find it expedient to number all wharves in the city,) I shall deem my title in said property complete, and may in security lease them or transfer them to others, on a title founded on such a report and your approbation thereof, stating also that it was erected *in front of my own lots* as the act requires." (Rec. VI, 188.)*

On April 15, 1797, N. King, as Surveyor, transmits to the Commissioners plans and surveys of these wharves, with the expression, in effect, of his inability to report whether they have been erected agreeably to the Building Regulations of July 20, 1795, or not. (Rec. IV, 1604.)†

* Act Md. Dec. 19, 1791, Sec. 12. (Burch Dig. 223; Davis' Laws, 70.)

† The brevity of this communication and the sense of injury with which it was evidently written, were, at least, pardonable to a man of science and of spirit.

The Commissioners had directed Ralston, the Surveyor, to report whether the wharves of Nicholson had been erected agreeably to the Building Regulations of July 20, 1795, and to N. King who, upon the retirement of Ralston, had consented, on October 1, 1796, to act as Surveyor, only until the arrival of the elder (Robert) King from England, (Rec. IV, 1603,) that direction had fallen, as it were, by way of succession. (Rec. IV, 1626; VI, 196.)

On December 3, 1796, N. King, with singular sagacity and correctness, explains to the Commissioners, the difficulties attending the execution of their direction, on account of the indefinite and uncertain terms of the Regulations, and desires the advice and determination of his official superiors, upon some particular embarrassments he thus encounters. (Rec. IV, 1626–1628; VI, 196–197.)

Of this most important and interesting communication, the Commissioners, though they recorded its receipt, (Rec. IV, 1628,) seem to have taken no other notice.

Pressed by Nicholson for a report, N. King, on January 25, 1797, renews to the Commissioners his request for their determination of the problems discussed in his letter of December 5, (*Sic*, by *error*, for 3d,) 1796. (Rec. IV, 1628.)

The wharf described by Mr. Nicholson as that "at Anacostia Point," (identical with the "Point" in the land of Notley Young,) is shown by the plat and survey of that wharf, by N. King, bearing date April 14, 1797, (Rec. V, second plat after p. 120,) to lie opposite that part of square 503, which, upon comparing the details of the plat with that of the square itself, (Rec. VI, 260; VII, 2149) may be said, with sufficient accuracy, to be about the western 42 feet front of lot 14, by the depth of that lot.*

To this communication, also, the Commissioners appear to have returned no reply.

Again, on March 8, 1797, in transmitting a series of plans of that portion of the city in the vicinity of the water, he unfolds to the Commissioners the numerous inconveniences which must inevitably arise, in the practical execution of the Building Regulations, upon any existing plan of the city, towards the water. (Rec. IV, 1602–1603.)

And of these representations, the Commissioners appear to have taken no other notice than to record their receipt. (Rec. IV, 1603.)

It was under such circumstances, that, in transmitting to the Commissioners the plans and surveys of the wharves of Nicholson, ordered to be made by his predecessor, N. King observes:

"I am unable to comply with so much of that order as requires me to report to you whether these wharves are built agreeably to the Regulations published by the Board, respecting the building of wharves. The cause of that non-compliance I have laid before the Board, in letters dated the 5th, (*Sic*, by *error*, for 3d,) of December, 1796, and the 8th of March, 1797. (Rec. IV, 1604.)

The Building Regulations, though wisely perceived by N. King, to afford no practical regulations, whatever, remained without improvement, at the hands of the Commissioners; and, as we shall see hereafter, the anomalies resulting from the execution of a defective *plan for exercising* the wharfing privilege, were left to be mistaken, by succeeding generations, for conflicts over the *existence* of the privilege itself.

* The manner in which this square is represented upon certain of the maps contained in the record, and, particularly upon *Exhibit B* of the bill, (Rec. I, immediately after p. 4: Rec. V, at beginning,) might lead-perhaps, to the conclusion that between this square and the street near,

Washington Map of 1797.*

The assistance promised, on March 14, 1792, by the Commissioners to Andrew Ellicott, and the objects they expected him to accomplish, (Rec. V, 79; Rec. VII, 2212–2213,) the subsequent complaints from the Commissioners of his inattention to duty, (Rec. VI, 274,) yet followed, on April 9, 1793, by his selection as chief of the Surveying Department; (Rec. VI, 179, 276;) the substitution, in the summer of 1793, of *Briggs* and *Benjamin* Ellicott, in his stead, and the later displacement of Briggs by *Joseph* Ellicott; (Rec. IV, 1591; Rec. VI, 277;) the final dismissal, as early as December 17, 1793, of Andrew Ellicott from his office, (Rec. VI, 277,) and, on January 28, 1794, of his brothers, Benjamin and Joseph, (Rec. IV, 1592,) and the appointment of *Fenwick* in their stead, (Rec. VI, 280,) need be no more than suggested.

Nor can it be profitable to speculate upon the causes from which *Freeman*, made assistant to *Fenwick*, on March 5, 1794, (Rec. IV, 1593,) became his successor, as early as June, 1795, (Rec. VI, 245; see *id.* 246,) and *Ralston*, made assistant to Freeman, as early as July 8, 1795, (Rec. IV, 1570,) became, at whatever date after May 17, 1796, (Rec. IV, 1572, 1622,) successor to Fenwick, to be dis-

est the water, a *blank* square had been interposed; but the *blank* square next the square *marked* as 503 on that Exhibit, is but part of square 503, separated therefrom by a street, (Rec. VI, 260; VII, 2149,) now known as Union Street. (Rec. I, third plat after p. 324.)

*First known, through the present record, as the "Dermot Map," the "Tin Case Map," the "Appropriation Map," &c., &c., &c.

placed, with the papers of his office in confusion, (Rec. IV, 1626; Rec. VI, 196,) on October 1, 1796, (Rec. II, 636,) by *Nicholas King*, (the wisest and most accomplished of the early surveyors,) who, on September 12, 1797, (Rec. IV, 1528, 1632; Rec. VI, 202,) had resigned, in favor of his father, *Robert*, (Rec. VI, 202,) to resume his position, on or about August 24, 1802, (Rec. II, 636, 665–666; Rec. VII, 2271,) after the offices of the Commissioners had, under act Congress May 1, 1802, (2 Stat. 175,) ceased to exist.

But the selection *of ten different persons*, in less than the same number of years, to rank, or act, as heads of the surveying department, during the development of the plan of the city, could scarcely have failed to be attended with many variations in that plan, had the work of each officer been conducted with accuracy, and free from the temptations of professional jealousy.

In appointing Major Andrew Ellicott to the office of chief surveyor, the Commissioners, on April 9, 1793, impressed with the inaccuracies already discovered in his work, and with the necessity of securing the correctness of future surveys, (Rec. VI, 215,) and apprehensive, that, from the circumstances attending the preparation of his plan, it would fail to correspond with actual measurements of the ground, (Rec. IV, 1607; VI, 229,) had entered an order, in part, as follows:

"The head of the surveying department is to conduct the field work and be answerable for its accuracy and dispatch. As soon as any square is finished and marked on the ground,

he is to deliver into the Commissioners' office, to their clerk, a certificate in the following form:

"April 10th, 1793.

"Surveyed square 100, bounded by street on the north, street on the south, street on the west, and street on the east (or otherwise enumerating the lines as the truth is); it is feet on the north & south and feet on the east & west.

"A. B.

"The work is from time to time to be added on the large plat which, on being finished, is to be considered as a record."

Rec. IV, 1574–1575; VI, 178–179.

"The platting and division of squares into lots," was, at the same time, withdrawn from the Surveying Department, (Rec. IV, 1575; Rec. VI, 179,) and confided to James R. Dermott,* (Rec. IV, 1575,) formerly an assistant in the Fauquier and Alexandria academies, of Virginia,

* What was done by Mr. Dermott, in the year 1793, as he appears to have been sustained by the Commissioners, must be taken, at this day, to have been free from serious objection.

June 17, 1793, Andrew Ellicott to Commissioners. (Rec. IV, 1577.)

But he early became the subject of grave censure from the surveyors, such censure precipitating very unseemly controversy, and such controversy contributing, in large measure, to an entire change in the *personnel* of the surveying staff.

Perhaps ——

Iliacos intra muros peccatur, et extra.

April 3, 1793, President to the Commissioners. (Rec. VII, 2222.)
March 24, 1794, Commissioners to President. (Rec. VI, 280–281.)

Briggs and Benjamin Ellicott to the Commissioners, on—
July 29, 1793, (Rec. IV, 1580.)
Sept. 3, 1793, (Rec. IV, 1583.)
Sept. 20, 1793, (Rec. IV, 1586.)
Oct. 15, 1793, (Rec. IV, 1587-1588.)
Oct. 17, 1793, (Rec. IV, 1589.)
Oct. 18, 1793, (Rec. IV, 1589–1590.)

(Rec. VI, 281; VII, 2231,) but who had been employed, in March, 1792, by the Commissioners, as calculator and assistant to Andrew Ellicott. (Rec. V, 79; VI, 281; VII, 2213.)

On June 15, 1795, Mr. Dermott, is "directed to prepare a plan of the city,* with every public appropriation plainly and distinctly delineated," &c. (Rec. II, 658; IV, 1599; VII, 2230.)

It is said by Dermott, that "there were no returns of any squares, whatsoever, until after April meeting, 1793." (Rec. VI, 215.)

From the returns thereafter made by the surveyors, Dermott compiled the Washington Map of 1797. (Rec. II, 633, 655; VI, 212.)

He had nothing, whatever, to do with admeasurements upon the ground. (Rec. IV, 1646, 1647.)

His functions were those merely of calculator and draftsman.

"My plan," he observes, "was made for the purpose of connecting the channels of the Potomac and the Eastern

*The witness, Stewart, asserting that this map was finished on July 24, 1795, (Rec. IV, 1559,) and offering, for such assertion, a reason as remarkable as the assertion itself, (Rec. IV, 1646,) concedes, that there exists no record in relation to the subject. (Rec. IV, 1649.)

Dermott himself refers to changes introduced by N. King, amongst other surveyors, in the Engraved plan, before the plan of 1797 "*was made.*" (Rec. VI, 212.)

N. King first became surveyor on October 1, 1796. (Rec. IV, 1527.)

Branch, with the squares of the city; it was made from official documents *returned from surveyors in the field*, agreeably to the regulations made by the Commissioners at their April meeting, 1793." (Rec. VI, 212.)

And all alterations and changes, from the Engraved Plan, except as to a few blank squares, were made, (according to Dermott,) by the Ellicotts, Freeman, Ralston and N. King, in advance of the completion by Dermott of *his* plan. (Rec. VI, 212.)

On October 1, 1796, the Commissioners write, in part, to Morris and Nicholson, as follows:

"We have addressed the President very fully on the necessity of specifically and permanently fixing the several public appropriations in the city, and have no doubt this will be done. We shall have them plainly and distinctly delineated on our large map, made out with great care and accuracy, and which will be preserved among the original records of the city."

Rec. VI, 316; VII, 2234.

On March 2, 1797, upon the eve of his retirement from office, the first President had requested Beall and Gantt, the trustees in the deeds from the original proprietors, "to convey" to the Commissioners, for the use of the United States, forever, according to the tenor of the act of Congress of July 16, 1790, "all the *streets* in the city of Washington, as they are laid out and delineated *in the plan of the said city hereto annexed;* and also the several *squares, parcels and lots of ground following, to wit,*" being *seventeen public appropriations*, described, respectively, by metes and bounds, (Rec. VI, 152–154,) the *third, fourth*

and *sixth* of these appropriations being bounded, towards the water, by the Potomac, the *fifth*, partly by that river and partly by the Eastern Branch and the *thirteenth* and *fourteenth*, by the Eastern Branch only.

The *plan of the city* thus mentioned by the first President, was the plan which had been constructed by Dermott, from the returns made by the surveyors. (Proceedings of Commissioners, June 21, 1798. Rec. IV, 1518.)

Though the instrument embodying such the request of the President to the trustees, had described the plan of the city as *annexed* to that instrument, yet, in the pressure of official business, incident to a closing administration, the plan failed to be actually so annexed. (Rec. VI, 204.)

On June 21, 1798, the Commissioners write President Adams as follows:

"SIR: At the close of the late President's administration, he executed an act directing the trustees of the city of Washington to convey to the Commissioners the streets of the said city and the grounds which were appropriated to public use. In the press of business the plan referred to was not annexed. We now send it by Mr. Nourse, with the original act and the draft of another act, which appears to us proper to be executed by the present President, in order to remove any objection to a compliance with the late President's request arising from the omission above mentioned. As these acts are the authentic documents of the title of the public to the lands appropriated, we shall write to Mr. Craik, or some other gentleman, to take charge of their return rather than trust them to the mail.

We are, with sentiments of the highest respect, sir," &c.

Rec. II, 660; IV, 204.

The following entry occurs, on the same date, in the Proceedings of the Commissioners:

"Letter written to the President of the U. S. enclosing an instrument of writing to be executed by him authorizing a conveyance of the streets and public appropriations from the Trustees to the Commissioners; also, the last plan of the city, made by Mr. Dermot, and referred to in said instrument of writing, forwarded to him by Mr. Joseph Nourse." (Rec. IV, 1518.)

And, on June 25, 1798, the Commissioners write to Mr. Craik, at Philadelphia, *thus:*

"SIR: Some days ago we sent the plan of the city of Washington to the President, in order to procure his directions to the trustees to convey the streets and public property in the city to the Commissioners. The plan is enclosed in a tin case, too large to go by the ordinary conveyance of the mail. Mr. Joseph Nourse was so obliging as to take the charge of it to Philadelphia, and we request the favor of you to bring it with you when you return, as the enclosure is of great importance, being the evidence of the public property in the city.

We are respectfully, &c."

Rec. VI, 206; VII, 2251.

On July 23, 1798, the second President, by an instrument reciting the "act" executed by his predecessor on March 2, 1797, and the non-annexation to that "act" of the plan of the city therein mentioned, makes known to Beall and Gantt, trustees, that he has "caused the said plan to be annexed to the said act," and requests them to convey to the Commissioners, for the use of the United States, forever, according to the tenor of the act of Congress of July 16, 1790, "all the streets in the said city of Washington, as

they are laid out and delineated in the plan of the said city hereto annexed, and all the squares, parcels, and lots of ground described in the said act * * * as public appropriations." (Rec. VI, 156–157.)

On July 25, 1798, Mr. Pickering, as Secretary of State, writes the Commissioners, as follows:

"The President has executed the Act proposed in your letter of the 21st of June, and I now return it, with the Act of the former President, to which it refers, annexed to the plan of the City of Washington, authorizing the Trustees to convey to the Commissioners the streets in that city and the grounds which were appropriated to public use. Mr. Craik takes charge thereof, and of the plan and elevation of the Treasury Office which I received of Mr. George Hadfield." (Rec. II, 661.)

And on August 31, 1798, there is the following entry in the Proceedings of the Commissioners:

"Mr. William Craik delivered into the office the plan of the City of Washington, with the Acts of the late and present Presidents annexed," &c. (Rec. II, 661; VI, 207.)

The original of this plan, "enclosed in a large tin cylindrical case," and the originals of the "acts" of the two Presidents, were produced by Stewart, in the course of his examination below. (Rec. IV, 1518–1519.)

The records relating to early public transactions in the city, not being in print, and if at all known to the law advisers of the Government, not easy of collection and comparison, were not always consulted or attended to by those advisers.

Much want of information, in respect to those records, is disclosed in the Opinion given, on April 5, 1806, to President Jefferson, by Attorney-General *Breckinridge.* (Rec. VII, 2273.)

And, in the Opinion delivered, on December 16, 1820, by Attorney-General *Wirt*, to President Monroe, after reference to the Opinion of Mr. Breckinridge, it is, in effect, plainly concluded, that, if "President Washington has, as Mr. Breckinridge states, previously ratified Ellicott's engraved plan, this must be considered *as the plan he intended to annex*, and it was not competent for President Adams to give the instrument of writing *a different direction, by annexing to it a different plan.*" (Rec. VI, 351.)

The Washington Map of 1797, to the extent to which it was completed, became the final and ultimate plan of the City.

(*a*) On June 21, 1798, the Commissioners, as we have just seen, enter, in effect, in their Proceedings, that they had written a letter to President Adams, "enclosing an instrument of writing to be executed by him, authorizing a conveyance of the streets and public appropriations from the Trustees to the Commissioners; also, *the last Plan of the City*, made by Mr. Dermott, and referred to in said instrument of writing." (Rec. IV, 1518.)

(*b*) On January 7, 1799, Attorney-General Lee, in his Opinion to the same Executive, remarks:

"Already a plan of the city has been approved and ratified by the President of the United States, who has either signed the plan itself, or an instrument referring to the plan, which I presume is a sufficient authentication.

"If this plan, under the President's signature, varies from the L'Enfant's or Ellicott's essays, they must each *yield to it*, as they are to be considered only as preparatory to that plan which received ultimately the formal and solemn approbation of the President. It is not supposed that this is incomplete in any respect, *except in relation to the rights appurtenant to the water lots, and to the street which is to be next to the water courses.*" (Rec. VI, 293.)

See, also, Commissioners, March 23, 1802, to Mr. *Dennis*, Chairman of a Committee of the House of Representatives. (Rec. VI, 232.)

(*c*) On April 8, 1802, a Committee of the House of Representatives, through Mr. Dennis, their Chairman, in referring to the Dermott map, observe:

"This plan has been signed by Mr. Adams, in conformity with which the trustees were directed by him to convey the public grounds to the United States, *and is considered by the Commissioners the true plan of the city.* The plan has never been engraved or published." (Rec. VI, 296, 334.)

"Your Committee are of opinion that, suffering the engraved plan, which is no longer the true plan of the city, to continue to pass as such, may be productive of great deception to purchasers; and that measures ought to be taken for its suppression." (Rec. VI, 196.)

(*d*) On July 14, 1804, President Jefferson, addressing Mr. Monroe, then the Superintendent, and referring to the

Dermott plan and the "act," or declaration, of the first President, in connection therewith, remarks:

"The Plan and declaration of 1797 were final so far as they went; but even they left many things unfinished, some of which still remain to be declared." (Rec. VII, 2273.)

It can serve no useful purpose to enumerate the particulars in which the Washington Map of 1797, varies from the Engraved Plan of 1792. (Rec. VI, 199, 212–215, 230–233, 334; VII, 2242, 2269.)

The differences between the Washington Map of 1797, (Rec. V, immediately after p. 118,) and the Engraved Plan, whether on the Philadelphia Plate, (Rec. I, immediately after p. 324; Rec. V, immediately before p. 77,) or the Boston Plate, (Rec. V, immediately before p. 120,) may be ascertained by the eye.

On September 25, 1803, Nicholas King, in recapitulating those differences, mentions the introduction of "upwards of" 130 new squares, in the Washington Map of 1797. (Rec. VI, 305.)

It was found by *Stewart*, in 1888, that the exact number was 136, there being, also, omitted from that Map, 32 of the squares delineated upon the Engraved Plan of 1792. (Rec. II, 678.)

If a Justice of this Court should happen to reside at No. 1515 Massachusetts avenue, N. W., in this city, he would look in vain through the Engraved Plan, to discover the

square in which he dwelled, though the Washington Map of 1797 would at once fix such square, as the square (too small, from the scale of that Map, to carry its number,) north of square 196.

Illustrations of squares exhibited upon the Engraved Plan, but omitted from the Washington Map of 1797, in the land of Notley Young, may be seen in square 301, interposed, on the Engraved Plan, between Water Street and square 300, and in the unnumbered square located, upon the same Plan, west of square 503, lot 11 of which last square, forms one of the particular subjects of the present Brief.

On March 8, 1797, Nicholas King, in a letter to the Commissioners, referring to this plan and to the Regulations of July 20, 1795, remarks:

"The plan of the city, where it bounds on the river, does not seem to have been at all attended to, but wherever the squares came to its present banks they stopped, or their course and extent was left to chance, although in many instances there would be several hundred feet remaining between such termination of them and the channel.

"How this, which is certainly the most interesting part of the plan, has been so neglected, it is not for me to know; but it is certain that the same authority which sanctioned and directed the laying out and establishing the other squares and streets ought to have been, as it was equally capable of being, extended to this portion of the city. This part of the business of those who were to lay out the city has not been attended to with the care the subject merited, and the longer it is neglected the more serious will be the evils arising therefrom. I write not to blame others, but to discharge my duty."

Rec. IV, 1603; V, 84; VI, 200.

The final expressions of Nicholas King, (as far as disclosed by the Record,) are contained in his letter, (so often cited,) of September 25, 1803, to President Jefferson.*

"Although the engraved plans, as well as Major L'Enfant's, carried the streets to the navigable water, exhibiting how the improvements and streets on the flats, which must be filled up to arrive at the channel, were to take place, it has been laid out on the ground and acted upon in sales, no farther than the bank of the river. As it regards the future health of the city, the convenience of the merchantile interest, and the designation of the limits of property, and the rights acquired by purchasers in the vicinity of the water, it is of importance that this part of the plan be established before many wharves are built, or much property involved in the decision." (Rec. VI, 306.)

"That there should be one continued street on the water side of the city, in which the others terminate, beyond which no house or building, which may impede the access of air, or be the cause of a nuisance, will be allowed, seems indispensable." (*Id.*, *ib.*)

Adverting to the inaction of the Commissioners, in the premises, he continues:

"On this subject nothing was decisively done, from the publication of the plan, in 1792, to July, 1795. In laying off the city, they stopped, as before observed, on the bank of the river; sold the lots on the high ground, *with a water privilege*, without defining either what the privilege is, or the extent or direction in which the purchasers were to wharf and improve. (Rec. VI, 306.)

"On the 20th of July, 1795, the Commissioners published the regulations, (B,) which instead of defining, have thrown additional obstacles in the way. The permission there given to wharf and build as far as those interested please, not

* The citations from this letter are, indeed, tedious enough; but are deemed, by counsel, of very great importance.

interfering with the channel, may subject the city to all the evils of docks, slips and receptacles of filth, which ought to be so carefully guarded against, and which the published plan did prevent. For, although the squares on the ground and (*sic*) vicinity of the river, as they have been divided and sold, differ in many respects, from the engraved plan, yet that plan establishes the principle of a Water Street, *beyond which wharves only, but no buildings*, can be erected, and, as no channel line has been fixed, or depth of water to wharf to, the Regulation is incompetent to benefit the city. Persons wharfing are directed to leave a space for a street wherever the general plan of the city requires it, yet the engraved plan has been so far departed from as to be useless as a guide, while the office plans have never been carried to the extent necessary to determine where the spaces for streets must be. The Regulations further direct, that where no streets intersect the wharf, the maker of it shall leave space of 60 feet at the termination of every 300 feet of made ground. Whether these 60 feet streets are in addition to those in the engraved, or some other plan, cannot by individuals be ascertained, nor would the Board of Commissioners ever give information on the subject. Besides, the purchasers never knew where these 300 feet were to be measured from, for if it were from the last street on the land, it would not agree with other streets which are laid out; if from the shore or bank of the river, as the words 'made ground' imply, the street would have all the indentings and curves of the bank. In some places, it would be on the edge of the channel; or, where there is a great distance from the bank to deep water, there may be a considerable space to wharf and build upon, beyond the street directed to be left. (Rec. VI, 306–307.)

"Perfecting this part of the plan, so as to leave nothing for conjecture, litigation or doubt, in the manner which shall most accord with the published plans, secure the health of the city, and afford the most convenience to the merchants, requires immediate attention." (Rec. VI, 308.)

"The principle adopted in the engraved plan, if carried into effect and finally established in the plan now laid out

upon the ground, when aided by proper regulations as to the materials and mode of constructing wharves for vessels to lay at and discharge their cargoes on, seems well calculated to preserve the purity of the air. (Rec. VI, 309.)

"The other streets will here terminate in a street or key, open to the water, and admitting a free current of air. It will form a general communication between the wharves and warehouses of different merchants; and, by facilitating intercourse, render a greater service to them than they would derive from a permission to wharf as they pleased. The position of this Water Street being determined, it will ascertain the extent and situation of the building squares and streets on the made ground, from the bank of the river, and bring the present as near to the published plan as now can be done. It will define the extent and privileges of water lots, and enable the owners to improve without fear of infringing on the rights of others. (Rec. VI, 309.)

"Along the water side of the street, the free current or stream of the river, should be permitted to flow, and carry with it whatever may have been brought from the city along the streets or sewers. The wharves permitted beyond this street to the channel, may be stages or bridges with piers and sufficient water-ways under them. And, on the wharves so erected, it would seem proper to prohibit the erection of houses, or anything obstructing a free circulation of air." (Rec. VI, 309.)

Adverting to the necessity of maintaining public confidence by preserving upon some definite map to be sanctioned by Congress, or the President, the public appropriations, agreeably to the intentions of their donors, Mr. *King* thus, in a spirit of prophecy, concludes:

"The surveying is now so far completed, that it can be done with the utmost precision, and every foot of ground within the limits of the Federal City, *with its appurtenant privileges*, may be so defined as to prevent litigation or doubt on the subject. If it is not done at this time, the evils will increase, and every year add to our difficulties.

Even now, from the various decisions, or neglects, alterations or amendments which have heretofore taken place, some time and investigation may be necessary in the arrangement of a system which shall combine justice with convenience. *If this decision is left to a future period and our courts of law, they can only have a partial view of the subject, and any general rule they may adopt, may be attended with serious disadvantages.*" (Rec. VI, 310.)

Sed non augurio potuit depellere pestem.

The completion of the plan of the city, *in respect to Water Street*, was reserved to President Van Buren.

THE TRUSTEES REFUSE TO CONVEY TO THE COMMISSIONERS, UPON THE TERMS PRESCRIBED BY THE LATTER, THE STREETS AND PUBLIC APPROPRIATIONS.

Under the deeds of trust from the original proprietors, the streets and public reservations were to be conveyed by the Trustees to the Commissioners, in fee, for the use of the United States, (Rec. VI, 140,) while, by sec. 5, of the act of Maryland of December 19, 1791, (Burch Dig. 221; Davis' Laws 68,) such streets and public appropriation were to "remain and be for the use of the United States."

And it was in "*purchasers of lots*," that the legal estate, by means of certificates granted by the Commissioners, was to be vested, under the act of Maryland of December 28, 1793. (Burch Dig. 224; Davis' Laws, 484.)

The "magic" of this last enactment, might not, therefore, be thought by the Commissioners effective in respect to the Streets and Public Appropriations.

The unsuccessful demands made by the Commissioners upon the Trustees, for a conveyance of the streets and public appropriations, on June 22, (Rec. VII, 2244–2245,) July 19, (Rec. VII, 2245,) and November 3, (Rec. 2248,) in 1797, were followed, on January 7, 1799, by an Opinion from Attorney General Lee to the President, that no such conveyance was necessary, (Burch Dig. 336; Rec. VI, 294, 233, 338; VII, 2282,) but the Commissioners, during the spring and summer of 1799, still insisted on the conveyance, (Rec. VI, 321–322; VII, 2261, 2262, 2263,) submitting, on June 5th, 1799, to the President, through the Secretary of State, "the propriety of enforcing the execution of the trust," and requesting, in case that measure should be deemed expedient, the opinion of the Attorney General as to the form and method of procedure. (Rec. VI, 323.) The trustees, on the other hand, were firm in their refusal to convey, except in terms deemed inadmissible by the Commissioners, (Rec. VII, 2261–2262, 2263,) and received, indeed, on January 29th, 1799, from certain of the original proprietors, including Robert Peter, by N. King, his Attorney, a communication cautioning the Trustees, at their peril, not to convey the public appropriations, or the streets, in advance of the existence of some duly authenticated plan of the city, exhibiting all of the appropriations and streets which were to remain to the use of the United States, forever, agreeably to the provisions of the deeds of trust, and whereon all of the streets should be delineated, with the widths thereof. (Rec. VII, 2260, 2261.)

The anxieties of the Commissioners for a conveyance seem to have continued, during their official existence (Rec. VI, 330, 234,) but there exists no evidence that such anxieties passed to the *Superintendent* created by act Cong. May 1, 1802, (2 Stat. 175; Burch Dig. 235; Davis' Laws, 130,) as successor of the Commissioners, many of the powers of which officer, as such successor, became vested in the municipal corporation erected for this city, under act Cong. May 3, 1802. (2 Stat. 195; Burch Dig. 5; Davis' Laws, 136.)

The subject, at this day, would be resolved, at once, upon the position taken by Mr. Lee.

Of the streets and public appropriations, the United States were in possession, and under an *equitable* title, at least, which could not be questioned.

OF THE PERFECTION OF WATER STREET, BY THE PRESIDENT, IN 1839, SUBJECT TO THE RIGHT OF WHARFING BY ABUTTING OWNERS ON THAT STREET.

The relinquishment by the original proprietors of their *titles to the land* embraced in the streets of Washington, is deduced, by this Court, from the legal import of specific language supposed to have been contained in the conveyance made, on November 30, 1796, by the Trustees to the Commissioners. (Rec. IV, 1395.)

"Now, upon such legal import," remark this Court, "there do not seem to be grounds for any reasonable doubt. The streets and public squares are declared to be conveyed *for the use of the United States forever*. These are the very

words which by law are required to vest an absolute unconditional fee simple in the United States. They are the appropriate terms of art, if we may so say, to express an unlimited use in the Government."

Van Ness, &c., *v.* The City of Washington, 4 Pet. 285.*

And it is, exclusively, upon their ownership, *in fee* of Water Street, that the right of the United States, as riparian proprietors, has been in this Court made to repose.

109 U. S. 672.

What would have been the effect upon the rights of Notley Young, as riparian proprietor, had the Government been vested merely with a perpetual *easement* in Water Street, this Court declared it unnecessary to discuss. (*Id.* 681–682.)

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*It is shown from the minutes of this Court, that, in 4 Peters, 232, argument was continued from day to day, (except on Sunday, March 7th,) from Thursday, March 4th, to Tuesday, March 9th, both inclusive, and that the Opinion and decree of affirmance were pronounced on March 15th.

The Court was without the convenience of *printed* transcripts, before the act Congress, March 3, 1837, (5 Stat. 169,) and though, upon examination, justified by precedent, (127 U. S. 169,) of the record of that case, it appears, that the conveyance executed to the Commissioners by the Trustees, on November 30, 1796, formed part of that record, and was incorporated, at large, into the bill, as "*Exhibit E*" thereto, it was, perhaps, from the generality of the averments contained in the bill itself, touching that conveyance, (4 Pet. 234,) and from the admission of such averments in the answer, (*id.* 239,) that Mr. Justice Story was induced to suppose, (*id.* 285,) that the *streets* were embraced in that conveyance, as required by the deeds of trust. (Rec. VI. 140.)

Only the *building squares* were included, in fact, in that conveyance, (Rec. IV, 1398,) and the *streets*, as well as the public appropriations, in the city, the Trustees, as we have already seen, in defiance of directions from the first President, and from the second, refused to convey. (Rec. VI, 152, 156–157, 204, 206, 233, 234, 290, 294, 296, 318, 319, 320, 321, 322, 323, 338; VII, 2239, 2251, 2252, 2255, 2260, 2261, 2262, 2275.)

Had the attention of that great jurist been drawn to this inadvertence, it may be safe to conclude, that he would have corrected it with all the magnanimity he exhibited in Clarke *v.* Mathewson, 12 Pet. 173.

IT WAS COMPETENT FOR THE UNITED STATES TO ACQUIRE WATER STREET, QUA STREET, MERELY, AND WITHOUT THE INCIDENTS OF RIPARIAN OWNERSHIP.

It is no part of the contention of the present appellants, that, because title to the land embraced in Water Street, happened to become vested in the Government, under the description of *a street*, the United States must be excluded, by force of such description, from the privilege of wharfing in connection with that land.

Yet, it is submitted, that it was *competent* for the United States, if so they should desire, to acquire that land solely and strictly for the purposes of a public highway, and without any of the incidents of riparian ownership.

By act Cong. July 16, 1790, Sec. 3, (1 Stat. 130; Burch Dig. 226; Davis' Laws 115,) the Commissioners "shall have power to purchase or accept *such* land," on the eastern side of the Potomac, "*as the President shall deem proper, for the use of the United States, and according to such plans as the President shall approve.*"

The land of Notley Young is conveyed, in trust, to be laid out for a Federal City "with *such* streets, squares, &c., * * * *as the President shall approve*," and "all the *said* streets and such of the said squares," &c., "as the President shall deem proper for the use of the United States," are to be by the Trustees conveyed to the Commissioners, in fee, for such use, forever. (Rec. VI, 140.)

The proprietors were committed, hence, to no appropriation of their property for *streets*, except for "*such* streets" as the President, by *his* plan, might approve.

The President, on the other hand, was rendered the exclusive judge of what land should be accepted, for the use of the Government, and of the character, number and location of the streets, within the City. (Rec. VII, 2269.)

It was as much within his power to decline, as it was to accept, land, for the establishment of a Water Street.

And, as he might accept such land, absolutely, he might accept it in a qualified and limited measure or manner.

So, the President was made sole arbiter of what land should be deemed "*proper for the use of the United States.*"

And as he might reject land as, in all respects, unsuitable for such use, he might accept land, as appropriate to some particular use or service of the Government.

So, the land accepted by the Commissioners was to be by them accepted "according to such plans" as *the President* might approve.

The President alone, was, hence, empowered to prescribe *the plan, or plans, for the Federal City.*

It was *competent*, in a word, for the President, to accept the land embraced in Water Street, for use, *sub modo*, by the Government; that is, for those purposes which a street might be ordinarily expected to subserve, and without interference with the privilege of wharfing which, but for the intervention of Water Street, might belong, on the division of the land of Notley Young, to the lots, public and private, situate on the north side of that street.

The Commissioners, in their official transactions, respecting the land of Notley Young, represented the President, as directly, in law, and as certainly, at least, in point of fact, as, in their official transactions, the heads of the executive departments are held to represent the President.

Wilcox *v.* Jackson, 13 Pet. 513.

Woolsey *v.* Chapman, 101 U. S. 769.

The concession by the Commissioners, that the lots, on

the north side of Water Street, in the land of Notley Young, continued to enjoy the riparian privilege, notwithstanding the existence of that street, was but a concession, in effect, *that the land in that street had been accepted by the President, for the use of the United States, for those purposes only which a street was commonly intended to answer, and without any incidental appropriation of the riparian privilege.*

The privilege of wharfing could not exist as appurtenant to Water Street, and be "annexed," at the same time, to the lots on the north side of that street.

The President, in effect, accepted and approved Water Street, in front of private property located thereon, as a street only, and without any incidental appropriation of the riparian privilege opposite such property.

This contention requires us to anticipate, what is discussed in a later connection, the Plan proposed by William Ellicott, in 1835, for the establishment of Water Street and for the regulation of wharfing thereon, and the action taken upon that Plan, in 1839, by the City Councils, the Commissioner of Public Buildings and the President of the United States.

The subject of "water privileges" then being before the Councils of the City, *William Elliott*, its Surveyor, in 1835, suggests to *William A. Bradley*, its Mayor, that system which is deemed by the former "best for SECURING *those privileges* in the most *equitable manner amongst*

those who own property facing on Water Street, as well as SECURING *the public rights.*" (Rec. VI, 265.)

The only plan of the City, then therein having the force of authority, was that disclosed upon the Washington Map of 1797, and upon that Map, Water Street, along the land on the Potomac which had belonged to Notley Young, was left incomplete, and, indeed, as to its southwesterly boundary, wholly undefined. (Rec. V, Map immediately after p. 118.)

To accomplish this *security*—to establish a condition in which men might thereafter repose *without a care** upon the subject—it was proposed by Elliott, in his Plan No. 2, that Water Street, besides being conformed to certain particular outlines, be rendered everywhere not less than 100 feet in width, between the Long Bridge and the then Arsenal Grounds, and that the construction of wharves and docks—of wharves, by individuals owning lots on the north side of Water Street, and of wharves or docks, by the public, opposite public appropriations, or the ends of streets terminating at the north line of Water street—between that Bridge and those Grounds, be governed by the principle, that the Water Street front of any such lot, appropriation or end of street, should furnish it a channel-front, only in the proportion existing between the total frontage of Water Street, estimated at 5,280 feet, and the chord, estimated at 5,050 feet, measuring the total channel-front—between the Long Bridge and the then Arsenal Grounds.

Rec. VI, 266.

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* The Constitution aims, as one of its objects, "to *secure* the blessings of liberty to ourselves and our posterity," and its 4th Amendment renders inviolable, "the right of the people to be *secure* in their persons, houses, papers and effects, against unreasonable searches and seizures."

Plan No. 2, of William Elliott, (Rec. I, second Map after p. 324,) is described, on its face, as that of part of the City "Exhibiting the *Water-lots* and WATER STREET and the Wharves and Docks *thereon*, along the Potomac, from E to T Street, south." (Rec. IV, 1514.)

The plan assigns, in the ratio proposed by its author, to every square on the north side of Water Street, a wharfing site from the south side of that street, to the "edge of the channel" of the Potomac, and to public appropriations and the ends of streets terminating at Water Street, sites for docks, or other like uses.

It represents Water Street as of varying width, and reduced, on its southern limits, to a curve lying parallel to that describing the edge of the channel.

And the squares, on the north side of Water Street, to which wharfing sites are assigned, are designated as "*Water-lots*," on the face of the Plan.

On February 22, 1839, the City Councils adopted the following Resolutions:

"*Resolutions* in relation to the manner in which wharves shall be laid out and constructed on the Potomac River.

"*Resolved*, That the plan, No. 2, prepared by the late William Elliott, in eighteen hundred and thirty-five, while surveyor of the City of Washington, regulating the manner in which wharves on the Potomac, from the bridge to T street south, and the plan of Water Street, shall be laid out, be, and the same is, adopted as the plan to be hereafter followed in laying out the wharves and the *street** on the said river: *Provided*, The approbation of the President of the United States be obtained thereto.

"*Resolved*, *also*, That the wharves hereafter to be constructed between the points specified in the said plan, shall

*This word is, inadvertently, put in the *plural*, in 109 U. S. 697.

be so built as to allow the water to pass freely under them; that is to say, they shall be erected on piers or piles from a wall running the whole distance on the water line of Water Street." Sheahan's Laws, D. C., 178. (an. 1857.)

These Resolutions were approved by the Mayor of the City, (Rec IV, 1387,) Mr. *Peter Force*. (Rec. VI, 311, 324.)

Before their passage, and on February 15, 1839, Mr. *Woodbury*, then Secretary of the Treasury, but destined to sit, in this Court, at January T. 1846, had referred Plan No. 2 of William Elliott, to *William Noland*, Commissioner of Public Buildings, and, (intermediately,) the successor in office of the Commissioners, for the opinion of that Commissioner, upon the judiciousness of the improvement contemplated in the plan. (Rec. VI, 323.)

On February 21, 1839, the day following the passage of the ordinance, Mr. Noland, acknowledging the receipt of the Plan, and returning it to the Secretary, reports, "that after due deliberation" he believes "*the improvement proposed, would be judicious and proper.*" (Rec. VI, 324.)

On February 23, 1839, the day following the passage of the Resolutions, the Plan, approved by the President, was transmitted by Mr. Woodbury to Mayor Force. (Rec. VI, 324.)

These transactions, so far as they can be supposed to represent *municipal action alone*, may be admitted to be attended with no other consequences than such as should be attributed to them as *police regulations*, and as evidence of the understanding which appeared to prevail, in 1839, in

respect to the definition of "*Water-lots*," and to the privileges belonging to property of that description.*

But the adoption of the plan of Elliott, assumes an obvious and interesting importance, when viewed as the *act of the President of the United States*, finally accepting land, under the Statute of 1790, for that use which he deemed proper for the Government, and according to the plan of which he approved, and declaring his final determination, agreeably to the provisions of the deeds of trust from the original proprietors, of what should constitute Water Street, and of the functions that street should be accepted to perform.

The *Proviso* contained in the ordinance of February 22, 1839, is significant and instructive.

By sec. 7 of Act Cong. May 15, 1820, (3 Stat. 586–587,) it was declared, that the Corporation of Washington should "have full power and authority," amongst other things, "to *erect*, repair and *regulate public* wharves," and "*to regulate the manner of erecting*, and the rates of wharfage at, *private* wharves." (Burch. Dig. 19–20; Davis' Laws, 345.)

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*The attention of the Court, in 109 U. S. 697–698, does not appear to have been directed to these Resolutions, otherwise than as an act of *local legislation*, approved by the President and defining the mode of exercising the right of wharfing, whether, (and without deciding whether,) such right were public or private.

No notice was taken by the court, of the Plan of Elliott, except as part of such legislation. The consideration of the Court was not, therefore, employed upon the effect of the *approval of that Plan by the President, as the ultimate approval by the* Executive of part of the plan of the city.

And the means of carrying these powers into effect, would be found in the ordinary exercise of municipal legislation.

By sec. 6 of act Cong. May 3, 1802, (2 Stat. 197,) the acts and ordinances of the Councils are "to be sent to the *Mayor*, for *his* approbation, and, when approved by him, shall then be obligatory as such," though such acts and ordinances, it is also provided, may be passed over his veto, by the vote of three-fourths of each council. (Burch. Dig. 6; Davis' Laws, 138.)

The language of this section (except as to the vote necessary to prevail over the veto, which was reduced to a vote of two-thirds of each chamber,) was re-enacted in sec. 4 of act Cong. May 15, 1820, (3 Stat. 585,) and such re-enactment was continued in force, (9 Stat. 223; 15 Stat. 61; 16 Stat. 8,) down to the act Cong. February 21, sec. 40, (16 Stat. 428,) repealing the charter of the City and creating a Territorial form of government for the District, under sec. 3, of which last mentioned act, (16 Stat. 419–420,) the analogies furnished by the Constitution, were applied to the approval and veto by the Governor, and the passage, notwithstanding his veto, of the acts of the Legislative Assembly.

To approve or disapprove our City ordinances, as such, the President of the United States was possessed, in general, of as little constitutional authority as the Governor of Massachusetts, or the Governor of the Territory of Florida.

The City Councils were as little justified, by law, in subjecting any ordinance which the Corporation, in its discretion, might legally enact, to the official approval of the

President, as to the official approval of the Commissioner of Pensions, or the Director of the Mint.*

But that feature in the plan of Elliott which regulated the manner in which wharves should be laid out, on Water Street, was inseparable from that feature in the Plan which regulated the mode in which Water Street itself should be laid out.

And to the President alone had been entrusted authority to act upon this latter feature of the Plan of Elliott, and to complete by the adoption of that feature, the Plan of the City, directly entrusted to the Executive by Congress, but so long and with such resulting inconveniences, neglected, in respect to the establishment of a definite Water Street, between the Potomac and lots in the land which had belonged to Notley Young.

Hence, the Proviso contained in the local ordinances of February 22, 1839.

Hence, also, the approval by the President of the Plan of Elliott, mentioned in that ordinance.

In 1875, the late Mr. *Joseph H. Bradley*,† testifying in the cases reported in 109 U. S. 672, said:

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*It is true, that to enable the Corporation of Washington to authorize the drawing of *lotteries*, for local public improvements, the approval of the President was rendered a condition precedent, by acts Cong. May 14, 1812, sec. 6, (2 Stat. 726; Davis' Laws, 249; Burch. Dig. 13,) and May 15, 1820, sec. 8. (3 Stat. 588, Davis' Laws, 347.)

But the condition thus imposed by Congress, was imposed in effect, *as a limitation upon the power of municipal legislation.*

Cohens v. Virginia, 6 Wheat. 446.

†This gentleman, mistaken in 109 U. S. 697, for William A. Bradley, his cousin, (Rec. IV, 1429-1430,) was born, in this City, on March 22, 1803, (Rec. IV, 1439, 1423,) less than three years after the removal thither of the seat of Government. He was admitted to the local bar of the District, at May Term, 1826, (Rec. IV, 1423,) and with the exception of the period embraced in his unlawful expulsion from that bar, (*Ex parte*

"That when the resolution of 1839, adopting that plan was passed, I went to Mr. Van Buren, the President of the United States, in my official capacity as counsel for the city, to explain to him the difficulties affecting the exercise of these riparian rights and the necessity of adopting some uniform plan in that regard, and thus to *complete the plan of the city*, in their (*sic*,) part of it."

Rec. IV, 1430.

Part of his further examination, in the same connection, was as follows:

"Q. State, if you please, the origin and the purpose of that plan.

"A. I know, that the lots so (*sic*,) fronted on Water Street at angles different from the lines of the streets, and different from each other in the several squares fronting Water Street; so much so, that, running out as far as the channel, only, they would close up the extensions of several streets running north and south, and they intercepted each other, in some instances, and thus deprived some of the lots of their riparian privileges. As the commerce in that part of the city increased, it became necessary, in defining the right of frontage of each lot, not only on the south side of Water Street, but also to establish some uniform proportion of front at the channel. The inconvenience was constantly increasing as new wharfs were projected or constructed. It

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Bradley, 7 Wall. 384,) remained, "for more than half a century, a most distinguished and honored member" thereof. (5 Mackey, VIII.)

He was admitted to practice (2 Pet. XII,) and first appeared as counsel, (*id.* 244,) before this Court, at January Term, 1829, and was, afterwards, here engaged in numerous causes, down to and inclusive of October Term, 1884. (112 U. S. 402.)

From 1835 to 1849, from 1854 to 1856, and from 1861 to 1868, he had been the official counsel of the city, (Rec. VI, 311,) and his acquaintance with its inhabitants, for many years after he first became such counsel, was truly extraordinary, (Rec. IV, 1448.) His testimony, whether examined intrinsically or with reference to details furnished by the present record, exhibits him as a man of uncommon intelligence, and of most tenacious memory in relation to early local transactions and events, *quorum pars magna fuit.*

was with this view to remedy this evil and to *complete the plan of the city* in that respect, that Mr. William Elliott undertook to devise a plan to remedy these inconveniencies and to define and perpetuate the rights of the several owners of lots fronting on Water Street, and at the same time preserve the rights of the public at the terminus of the several streets leading to the water *and thus complete the plan of the city in that respect.* I do not now recollect whether Mr. Elliott was instructed by the city or anybody else to devise this plan, or whether it was his voluntary act."

Rec. IV, 1431.

Nothing could be truer than the explanation of Mr. Bradley, as to the necessity for the completion, under the approval of the President, of the Washington Plan of 1797, in respect to Water Street.

In the memorial addressed by certain of the original proprietors to President Adams, on November 10, 1798, in respect to this Plan, it is said thereof:

"It is incomplete, inasmuch as the rights and privileges of wharfing and water lots are not ascertained; that street which in every former plan circumscribed the city beyond any building lots, and near the channel, and which was intended to promote the intercourse with merchants and the free conveyance of merchandise along the wharves, open a free passage for air from the water into the different streets and avenues terminating therein, is omitted, and in many places a distance of several hundred feet is left to be filled up and occupied by buildings and wharves, at the option of individuals. If the plan is left in this situation, no one can wharf or improve the water property, as he knows not where streets may be introduced; or, if it should eventually be permitted that they wharf and build at pleasure, every advantage which the plan of this city had over others is

lost, and the United States are voluntarily allowing reservoirs of contagion."

"We know your Excellency will attend to the necessity of defining what water privilege, or right of wharfage, is attached to the lots on the Eastern Branch, the Potomac River and Rock Creek; also, all such streets as are to be left in wharfing from the shore to the channel of the said waters, and the extent to which those wharves are to be carried, and what ground, so made and filled up, shall be considered as subject to occupancy by buildings."

Rec. VI, 292.

In a communication addressed by the Commissioners, on March 23, 1802, (Rec. VI, 228, 336,) to Mr. *Dennis*, Chairman of a Committee of Congress, (Rec. VI, 234,) the Commissioners, in reference to the above memorial, remark:

"The intention of the memorial was to persuade the President that it was necessary to cause a complete plan of the city, *including a Water street*, to be made and established, so that there could be no departure therefrom. It was referred to the Attorney General, who advised against making a new plan, because the plan to which the President's signature is annexed is sufficiently authenticated, and supersedes all prior plans; against making a plan unalterable, in the sense of the memorialists, because the appropriated grounds may be wanted for one purpose at this time, and for another at a future day; and against making the proposed Water street in the present state of the city funds, because it was more necessary to build houses than to reclaim land out of water. Upon this opinion the prayer of the memorial was rejected; and, as it contained a censure on the conduct of the Commissioners, it was, with all the papers accompanying it, by order of the President, sent to them for such observations as they might deem proper, either with respect to themselves or the public interest."

Rec. VI, 232, 338.

In the Opinion given to President Adams, by Attorney-General Lee, on January 7, 1799, the latter, in referring to the Washington Map of 1797, had observed:

"*It is not supposed that this is incomplete in any respect, except in relation to the rights appurtenant to the water lots, and to the street that is to be next to the water courses.*" (Rec. VI, 293.)

"*The laying off of Water street, when done in part or in whole, will stand in need of the sanction of the President.*" (*Id.* 394.)

OF THE PORTFOLIO AND OTHER MAPS OF NICHOLAS KING.

Amongst the plats found in the office of the Chief of Engineers, is a large portfolio, (Rec. II, 446,) bound as a volume, (Rec. IV, 1515,) entitled, on the outside, "Plan of the City of Washington, 1803," (Rec. II, 446; IV, 1509,) and containing sixteen sheets, (Rec. II, 446,) which are numbered consecutively (Rec. IV, 1515,) and embrace in their entirety, the whole of the city. (Rec. IV, 1516.)

The first of these sheets, is inscribed "Plan of the City of Washington, laid down agreeably to the surveyor's returns, by Nicholas King, S. C. W. 1803," (Rec. IV, 1516; Rec. II, 446,) but the other sheets in the volume are without title or designation. (Rec. IV, 1516.)

Exhibit B, filed with the bill, (Rec. I, immediately after p. 14; Rec. V, immediately after p. 4,) contains in its upper left hand corner, certain inaccuracies of statement pointed out in the answer of *Moncure Robinson* and others, (Rec. 1, 269–270,) though, in describing such Exhibit as Exhibit *E*, that answer itself involved a mistake, afterward corrected by stipulation. (Rec. IV, 1410.)

The wharves and docks shown upon sheet No. 2 of the portfolio, (Rec. V, second map after p. 76,) have been preserved in Exhibit B, (Rec. IV, 1515,) but there is no such book of plans No. 3, as is mentioned in the inscription upon that exhibit, (Rec. IV, 1516,) much less is the exhibit itself derived from any "Original Plan of the City."

Of sheet No. 2 of the Portfolio, it is said by the witness, *Stewart*, that Exhibit U. S. No. 45, (Rec. V, map immediately after p. 76,) is "an exact copy." (Rec. II, 446.) Yet, as Exhibit U. S. No. 45, bears an inscription not to be found upon sheet No. 2 of the Portfolio, and omits, also, the wharves and docks shown as well upon that sheet as upon Exhibit B, it is manifest that Exhibit U. S. No. 45 of the Government, and sheet No. 2 of the Portfolio, cannot be *ad idem*.*

If the Portfolio was either produced or first exhibited in 1803, neither Robert King, Sr., nor Robert King, Jr., could have contributed to its production or exhibition. The Portfolio of which he has the custody, is supposed by Stewart to be the original, (Rec. VII, 2388,) and

* Stewart, on December 6, 1890, (Rec. IV, 1650,) concludes that sheets 6, 7 and 8 of the Portfolio, are the work of Robert King, Jr., and the remainder, that of Robert King, Sr., (Rec. IV, 1655,) with the qualification, that, as to these latter sheets, Nicholas King might possibly have rendered some assistance, the witness being unable to distinguish between the very similar work and handwriting of Nicholas King and Robert King, Sr. (Rec. IV, 1656–1657.)

On June 10, 1892, (Rec. IV, 1718,) after his previous testimony had been reduced *to print*, the same witness expresses, in effect, his belief that Robert King, Sr., was the author of the Portofolio Maps. (Rec. IV, 1709.)

And on March 14, 1793, he deposes that the Portfolio was "prepared by Nicholas King." (Rec. VII, 2368–2369.)

Forsyth, the Surveyor, deposes that it was always considered and acted upon, in the office of the Surveyor, "as an authentic official map of the city," in fact, "the standard map," (Rec. III, 936,) though, in respect to the sites of *riparian privileges on Water Street*, Forsyth had been guided by the plan of William Elliott, adopted by the City Councils and approved by President Van Buren, in 1839. (Rec. IV, 1339.)

As the Washington Map of 1797 had been approved by the first President on March 2 of that year, and shortly afterwards returned to the Commissioners, and as Nicholas King continued in their service until September 12, 1797, it is probable that he had acquired some acquaintance with that map, while he was acting as Surveyor.

The map, for particular reasons, (Rec. VI, 204,) had been transmitted, on June 21, 1798, by the Commissioners to the second President, and was from him by them received on August 31, 1798. (Rec. II, 661; Rec. VI, 206.)

Nicholas King, as representative of certain private interests, had requested, on November 21, 1798, (Rec. II, 651; Rec. V, 119–120,) and had received on the next day, (Rec. II, 650,) permission from the Commissioners to copy such portions of that map as might "tend to show the squares in the vicinity of the water, and the public appropriations."

One of these copies appears to be contained in the Record, (Rec. II, 649, 676; Rec. IV, 1565; Rec. V, second plat after p. 118; Rec. VI, 267,) and is entitled "Plan of part of the City of Washington, showing Water street as far as it is laid off *on the plan lately transmitted by the Commissioners to the President*, with the streets and squares in its vicinity."

The exercise of the permission thus granted to Nicholas

King, must have rendered him familiar with the Washington map of 1797, before he again became surveyor, upon the abolition of the office of the Commissioners, in 1802.

Nicholas King had come into office under the Commissioners, on October 1, 1796, (Rec. II, 636, 637; Rec. IV, 1527,) and, on March 8, 1797, had furnished them, in respect to Water Street, along the Potomac, a series of plans* confessedly variant, in respect to that street, from the street contemplated under the Building Regulations of July 20, 1795. (Rec. IV, 1602; Rec. V, 83–84; Rec. VI, 199–200.)

Reference is, indeed, made, on August 14, 1797, by Mr. Davidson, in a letter to the Commissioners, to "Mr. King's elegant and descriptive work now going forward in your office." (Rec. II, 638; Rec. V, 83; Rec. VII, 2247.)

But, whatever might be the nature of this work, the retirement of Nicholas King from office, on September 12, 1797, (Rec. II, 636, 637,) ended his connection, under the Commissioners, with the enterprise.

Upon the resignation of Nicholas King, as surveyor, Robert King, Sr., was "appointed in his place, upon the same terms with respect to duty and emolument." (Rec. IV, 1528, 1563; VI, 202.)

Robert King, Sr., on May 31, 1802, had returned to the Commissioners, an inventory of the public property then in his office, (Rec. IV, 1616,) and, by sections 2 and 8 of the act of Congress of June 1, 1802, (2 Stat. 175–176,) the offices of the Commissioners were abolished, and the office of Superintendent created.

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*It is supposed by the court below, that these plans have been discovered in the "Brown sheets," (Rec. VII, 2532–2533,) much canvassed in the progress of the cause. (Rec. IV, 1638 *et seq*, 1691 *et seq.*)

This supposition was derived, perhaps, from that of the witness, Stewart. (Rec. IV, 1639.)

Robert King, Sr., and his son, Robert King, Jr., had probably sailed from Alexandria for their home in England, as early as August 15th, (Sunday,) 1802, (Rec. IV, 1528, 1616; VII, 2270,) and, on August 24, 1802, Nicholas King again became surveyor, now, under appointment from President Jefferson. (Rec. II, 636, 637; IV, 1529, 1617; VII, 2271.)

If the Portfolio was prepared by Nicholas King in 1803, the records of the Commissioners could contain no reference to it, of course. (Rec. IV, 1516, 1517, 1518, 1563–1564.)

And that it was ever approved by the President, or by Congress, none, perhaps, would venture to affirm.

On July 22, 1834, Mr. Noland, Commissioner of Public Buildings, employed William P. *Elliott*, then Deputy Surveyor of the city, to copy the Portfolio, and to color, *in yellow*, the lots which had fallen to the original proprietors, and, *in red*, those which had been sold by the Commissioners, or granted by Congress to religious or educational institutions. (Rec. II, 641–642; Rec. VII, 2277–2278.)

This copy is supposed by Stewart to be now in his custody. (Rec. II, 635.)

It is easy to understand and to appreciate the use that would be made by his successors in office, of the skill and taste displayed by Nicholas King, in his portfolio.

But that the author of that work supposed that any action of his, except as authorized by Congress, or by the Executive, could either alter or perfect the plan of the city, is conclusively refuted by his communication to President Jefferson, of September 25, 1803, (Rec. VI, 297–310; Burch Dig. 351–363,) as well as President Jefferson himself, who, in his letter of July 14, 1804, to Superintendent

Monroe, in reference to the Washington Map of 1797, and the executive "act" or declaration respecting it, observes:

"The Plan and declaration of 1797, were final, so far as they went, but even they left many parts unfinished, some of which *remain still to be declared.*"
Rec. VII, 2273.

And, indeed, while the L'Enfant plan, the Engraved plans, and "the present plan" of the city, (Rec. VI, 310,) are discussed in communication from N. King, in 1803, no notice is therein taken of the *theses of the writer* himself.

The objection to recognizing the Portfolio as the authoritative plan of the city, flows from the general confusion in rights and titles which must result from such recognition.

In respect to Water Street, *the cardinal object of the Portfolio*, as well as of other work of Nicholas King, was to define and render certain the riparian privileges of the owners of lots lying on the north side of that street.

In respect to square 472, *the annexation of the riparian privilege will be presumed.*

"God forbid," exclaims *Lord Coke*, "that ancient grants and acts should be drawn in question, although that cannot be shown which was at first necessary to the perfection of the thing."
12 Rep., 5.

The presumption of a grant may arise as well from the Crown or the State, as from an individual.

Barclay *v.* Howell's Lessee, 6 Pet., 513.
Fletcher *v.* Fuller, 120 U. S., 545, 551–552.
U. S. *v.* McLaughlin, 127 *id.*, 447.
Glasgow *v.* Baker, 128 *id.*, 556–557.

A possession of land even for twenty years, is good against the crown, until judgment by intrusion.

Doe. d. Wall *v.* Morris, 2 Bing., N. C. 189.

"In favour of long possession and ancient appropriation, everything which was done shall be deemed to have been rightfully done, and though it does not appear to have been done, the law will presume that whatever was necessary, has been done."

Mr. Justice Baldwin, in Strother *v.* Lucas, 12 Pet., 452.

"It is a principle," says Mr. Justice McLean, "which no enlightened tribunal, in the search of truth, and in applying facts to human affairs, can disregard."

New Orleans *v.* U. S., 10 Pet., 721.

"There is no difference in the doctrine," the same Judge remarks, "whether the grant relates to corporeal or incorporeal hereditaments. A grant of land may as well be presumed as a grant of fishery, or of common, or of way."

Ricard *v.* Williams, 7 Wheat., 109.
Fletcher *v.* Fuller, 120 U. S., 547.

Such presumptions "are founded upon the consideration that the facts are such as could not, according to the ordi-

nary course of human affairs, occur, unless there was a transmission of title to, or an admission of existing adverse title in, the party in possession." (7 Wheat., 109.)

This presumption may arise as the result of a single circumstance, or of many circumstances.

"So much depends upon the nature and situation of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it, that it is difficult to lay down any precise rule adapted to all cases."

Ewing *v.* Bennet, 11 Pet., 53.

"Neither actual occupation, cultivation, or residence, are necessary to constitute actual possession, (6 Pet., 513,) and when the property is so situated as not to admit of any useful improvement, and the continuing claim has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim." (*Id., Ib.*)

Even in England "it has been held that juries must be directed to presume an ancient lost grant from the Crown from long continued acts of ownership *exercised on the seashore* by the adjoining proprietors."

Tyler on Boundaries, p. 36.

"For whatever may commence by grant, is good by prescription."

Mitchel *et al. v.* The United States, 9 Pet., 760.

So, in Spain, it was held in the Supreme Tribunal of Justice, in 1860, that a long and uninterrupted use of water rights by private persons, conveys a title which cannot be impeached even by the crown.

Ayuntamiento de Benimodo *v.* Ferrendo et als., *cited in* Ensayo sobre las Aguas, por Franquet y Betran, tomo 2, p. 729.

In an action of ejectment, there was involved the title to a certain "*water-lot*," to the formation of which it appeared that the proprietors of an adjacent lot had contributed, by the deposit of earth as well as by other means.

It was considered that it might be well contended "that this labour of the proprietors made their claim and possession of the water-lot as notorious as if it had been surrounded by an enclosure." And it further appearing that "*a wharf and warehouse*" had been erected upon this water-lot, so soon as it had become susceptible of occupancy, "these facts," say the Court, "connected with the possession of the adjacent lot, since 1785, present a strong ground to presume a title."

Watkins *v.* Holman *et al.*, 16 Peters, 54–55.

License to build a wharf opposite this square had been granted to Notley Young, as original proprietor, on March 5, 1795, (Rec. VI, 284; VII, 2230,) and the wharf itself appears as an existing structure, upon the Washington Map of 1797. (Rec. V, map immediately after p. 118.)

From the plat of this square contained in the Record,

(IV, 1380,) it appears, that that portion of the square fronting on Water Street, was divided, through various conveyances, into four several parcels, which, for convenience of reference, are designated on that plat as—

No. 1, belonging to *Robert Y. Brent*, and adjoining No. 2.
No. 2, " " *Mary Y. Walsh*, " " 1 and 3.
No. 3, " " *Clement Cox*, for *Farleys*, " 2 and 4.
No. 4, " " *Frederick Cana*, and " 3.
Rec. IV, 1380.

Of these parcels, severally, beginning with—

No. 4.

This lot, on May 15, 1821, was conveyed to F. Cana, "*with all that part of the wharf fronting on the Water Street side of said lot.*" (Rec. IV, 1366.)*

May 15, 1821. Agreement between Brent and Cana, reciting, that it may be ascertained, that said wharf is built, not "according to existing regulations, or so as to encroach on the *water privileges of the adjoining lot*, or, by some future law or regulation, the *right and privilege of wharfing, appurtenant to the lots in said square*, may be so modified as to change the direction and position of the present

* The existence of Cana's wharf is recognized by act of the city councils, in 1823. (Burch Dig. 90.)

wharf, for the benefit of the holder of the adjoining lot." Therefore, "in case it should be found that the present wharf is not properly built, or encroaches on *the water privileges of the adjoining lot*," or in the event of such future law and regulation, and upon building by *Brent* of the wharf of *Cana*, so as to conform to such future law, and leaving him 60 feet front, *Cana* covenants to relinquish so much of the wharf conveyed by next preceding deed, as may be necessary to conform, &c., "for the benefit of the holder of the adjoining lot."

Rec. IV, 1366.

June 29, 1829, *Mary Ann Cana* (devisee of *F. Cana*,) *to William Stettinius et als.*, same lot, "with all *that part of the wharf fronting on the Water Street side of said lot.*"* (Rec. IV, 1367.)

September 7, 1833.— *William Stettinius et als.*, to *Joseph Stettinius*, same lot, with *wharf*, in like terms of conveyance as last above. (Rec. IV, 1367.)

September 7, 1835.—*Joseph Stettinius* to *Alpheus Hyatt*, same lot, with *wharf*, in like terms of conveyance—as last above.

October 11, 1850.—*Alpheus Hyatt et als.*, to *George Page*, same lot, with *wharf*, in like terms of conveyance as last above. (Rec. IV, 1367.)

* That is, following the language of the conveyance above recited, of May 15, 1821, from Robert Y. Brent to Frederick Cana.

No. 3.

On Sept. 29, 1823, *Robert Y. Brent* conveyed to *Pearson et als.*, this part of square 472, extending, on Water Street, from the corner of South L Street "to *Cana's* wharf," "and *embracing a wharf adjoining Cana's wharf.*" (Rec. IV, 1361-1362.)

Sept. 29, 1838.—*Brent et al.* convey to *Clement Cox* trustee for the Farleys*, the last above-mentioned lot, and, "also, all that *wharf or mole* lying due west of the said last described lot, and extending thence to the channel of the river. (Rec. IV, 1363.)

October 30, 1838.—*Clement Cox, Trustee*, conveys to *Farleys*, same lot, with *wharf*, in like terms as last above. (Rec. IV, 1365.)

December 6, 1850.—*Farleys* convey to *George Page*, same lot, with *wharf*, in like terms as last above. (Rec. IV, 1336.)

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*A distinguished member of the District bar, admitted to practice before this court at January Term, 1839, (13 Pet. XII,) and father of the learned Judge, (and most beloved gentleman,) (Rec. IV, 1363, 1365, 1368,) who, in the cases determined on appeal, by this court, in 109 U. S. 672, had decided, below, that square 472 was possessed of no riparian privilege. (Mac. & Mack. 285.)

No. 1.

September 29, 1838.—*Brent et al.*, convey to *Robert Y. Brent*, Lot No. 1, and "also *whatever part of a wharf or mole shall be due west of said last described lot*, and extending thence towards the river Potomac." (Rec. IV, 1365.)

June 29, 1850.—Robert Y. Brent conveys to *George Page*, same lot, with wharf or mole, in like terms of conveyance as last above. (Rec. IV, 1365.)

Nos. 4, 3 and 1.

April 13, 1859.— *Wallach, Trustee*, under decree against *Page*, reports sale, "in front of Powhatan House, near Page's wharf," of lots, amongst others, 4–3 and 1, "*with all the wharves and appurtenances*," to *Bryan*. (Rec. IV, 1368.)

March 14, 1860.— *Wallach, Trustee*, conveys to *Bryan*, and, with consent of latter, to *Berry* and *George Parker and Thomas Parker*, lots last above, "with *rights*, privileges, *moles*, *wharves*, appurtenances," &c. (Rec. IV, 1368.)

No. 2.

Sept. 29, 1838.—*Brent et al.* convey to *Mary Y. Walsh*, this lot, "with *all that wharf or mole or* part thereof lying due west of said last described lot, and extending thence to the channel of the river Potomac." (Rec. IV, 1363.)

May 9, 1843.— *Walsh et ux.* convey to *Frazier*, same lot, with wharf or moles, in like terms as next above. (Rec. IV, 1363.)

April 19, 1860.— *Wallach et al., Trustees*, under decree against *Frazier*, convey same lot, with wharf or mole, in like terms as last above, to *Bryan*, *Berry*, *George Parker* and *Thomas Parker*. (Rec. IV, 1363.)

Nos. 1, 2, 3, 4.

October 1, 1860.—*Bryan* and *Berry* convey to *Potomac Steamboat Company*, an undivided moiety of these 4 parts of the square, "and all the *wharves and water rights, property and privileges* belonging thereto." (Rec. IV, 1368.)

It thus appears, that from 1821, "*the privilege of wharfing appurtenant*" has been claimed, under recorded deeds

of conveyance, for the lots in this square, fronting on Water Street; that with part No. 4, of such square, *a wharf has been conveyed in express terms, since* 1821; that with part No. 3, *a wharf adjoining Cana's wharf*, has been conveyed, in like manner, since 1823; that since September 29, 1838, there has been conveyed with part 2, "*a mole or wharf*," and with part 1, "*whatever part of a wharf or mole*," if any, lay west thereof.

Considering the perishable nature of wharves constructed of wood and erected upon *piles*, the alteration of the channel, in the course of a century, and the imperfect appliances formerly in use for the alteration and repair of such structures, it is reasonable to suppose, that some changes from time to time occurred in the lines which those structures originally occupied.

Indeed, it is not probable, that the *fencing* of any considerable piece of unimproved real estate within the district, which has been under enclosure for as much as fifty years, would be found to correspond precisely, in all respects, with the lines of original construction.

Where the land was not of exceptional value, the owner, instead of excavating old posts, or confiding to their uncertain foundations, would perceive both economy and utility, in the erection of new posts, upon sites something, however slightly, variant from those of the old.

Men, in general, never buy, nor sell, property, which has no physical existence.

Much less are they likely, in business transactions, to feign, or invent, circumstances, in order to entangle the

judgment of a posterity with which it must be beyond their power to deal.

From Cana's wharf, Lafayette departed, in 1824, to visit Mount Vernon. (Rec. IV, 1760, 1777.)

The antiquity of this wharf is established by the recollection of many witnesses.

Rec. IV, 1760–1761; 1772, 1775–1776, 1803–1804, 1809, 1814–1815.

See, also, the testimony of Mr. *Ashford*. (Rec. IV, 1752.)

Of square 472, Mr. Joseph Bradley observes:

"I have known it as long as I can recollect." (Rec. IV, 1427.)

"As far back as I can recollect, there was a wharf at the southwest corner of such square, and M Street, which was called *Cana's* wharf, with which there was a warehouse on square 472, connected at the intersection of Water and M Streets. That wharf projected into the river, west, or nearly west. Above, and north of *Cana's* wharf, there was another wharf, as I recollect, at or near the terminus of 7th Street, which was known as *Brent's* wharf. That wharf projected into the river at an angle much more to the south than *Cana's* wharf. *Cana's* wharf was an old wharf when I first knew it. *Brent's* wharf was not quite as old as Cana's wharf." (*Id.*, *Ib.*)

And he remarks, that after he became of age, which was in 1824, "the wharves were claimed respectively by the Brent estate, and by the owners of the warehouse, I have

spoken of, as appurtenant to the lots owned by them respectively." (Rec. IV, 1427.)

In the further progress of his examination, Mr. *Bradley* says:

"When I spoke of the wharves before, I could recollect but two, Brent's wharf and Cana's wharf. I distinctly now recall one other, between Cana's wharf and Brent's wharf.* It was a part of the Brent property, or Young property, and on the division of the estate belonging to Brent's grandchildren, a lot or portion of the square, fronting on Water Street, was assigned to Mrs. *Farley*, the daughter of Joseph Pearson, and one of the heirs of Robert Brent's estate. Opposite that lot, on the north side of Water Street, was a wharf—being a third wharf—being the one I have mentioned. I was the attorney for Mr. and Mrs. Farley, for a number of years, and know that they claimed that wharf as appurtenant to that piece of ground. I know, also, that there was a controversy between Farley and his wife, and the owners of the corner lots with which Cana's wharf was connected, as to the line of direction of their respective wharves, which controversy was settled by an agreement in writing between the several parties, in which, as well as I can now recollect, Mr. *Cox*, as trustee for Mrs. Farley, was a party on one side, and Mr. *Hyatt*, as well as I can recollect, or somebody else, party on the other." (Rec. IV, 1438.)

*Mattingly recalls the same two wharves, and, also, a "*ferry wharf*," which, however, "was nothing more than a slip running up to the original wharf." (Rec. IV, 1472.)

"Q. State, if you please, at what time you first knew the third wharf, of which you have just spoken.

"A. To the best of my knowledge, it was anterior to 1814, and I fix that date by the fact, that after the British left the City, the military company to which my brother was attached, was stationed at the large house on the corner of N street South and 6th Street, and I visited him very frequently, two or three times a week or oftener, and very frequently passed by those wharves, and I cannot recollect when these three wharves were not there, until these modern changes." (Rec. IV, 1438.)

Part of his cross-examination, on the same subject, was as follows:

"Q. Please give the precise location in respect to the lots on the north side of Water Street, of Brent's wharf.

"A. The three wharves were built, respectively, as follows: Cana's wharf was connected with the Southwest corner of that square, and ran nearly East and West. There was then a space nearly up to Farley's wharf, Farley's wharf ran, probably, West-South-West, and if these two wharves had been extended to the channel, according to my recollection, they must have intersected each other, before reaching the channel. Between Farley's wharf—which, by the way was known in early days as Brent's wharf—and the next wharf above, called Brent's wharf, there was a considerable space, and Brent's wharf was built in a line nearly parallel to Farley's. It occupied a portion of the ground now known as Page's wharf." (Rec. IV, 1453.)

In respect to Water Street, the physical location of square 472 is but that of every other square, with the exception, perhaps, of square 233, carved from such land of Notley Young as was situate on the Potomac.

As to the wharf at 6th and O Streets, though often rebuilt, (Rec. IV, p. 1818,) it may safely be said to have been in existence for more than 60 years. (Rec. IV, pp. 1831–1832, 1818, 1823–1824, 1827–1828.)

The *Potomac* Steamboat Company, by deed dated July 17, 1856, (Rec. IV, p. 1403,) acquired Lots, 1, 2, 4 and 5 in square 4 3.

Mattingly, then Genl. Superintendent of that Company, (Rec. IV, p. 1466,) upon an official survey of the lots, dated August 7th, 1856, obtained the approval of the Mayor of the City for the erection of a "*new* wharf" opposite part of Lot 1, in that square, at the foot of 6th and N Streets, on Water Street. (Rec. V, Plat facing p. 366; Rec. IV, pp. 1838–1841.)

There can be little doubt, that this "*new* wharf" was erected upon the site of an ancient structure.

But the wharf opposite Lot 2, in that square, was built for the *Potomac* Steamboat Company, by himself, says *Baker*, in 1867 or 1868. (Rec. IV, p. 1846.)

The local usage in the District of Columbia sustains the privilege asserted by the complainants.

"Every country," says Mr. Justice *Baldwin*, "has a common law of usage and custom, both local and general, to which the people, especially those of a conquered or ceded one, cling with more tenacity than to their written laws, and all sovereigns respect them."

Strother *v.* Lucas, 12 Pet., 437.

And it is well observed by Mr. Justice *Story* that "*the laws* of a State" are "usually understood to mean the rules and enactments promulgated by the legislative authority thereof, *or long established local customs having the force of law.*"

Swift *v.* Tyson, 16 Pet., 18.

This is also the maxim of the civil law.

Sine scripto jus venit, quod usus approbavit, nam diuturni mores consensu utentium comprobati, legem imitantur. (*Inst.* 1, 2, 9.)

It was from the force of *local usage*, as we have already seen, that, in most of the Atlantic States, the riparian privilege became vested in private hands, in a manner supposedly unknown to the theory of the common law.

And "it is important that the uniform practice and usage of a country should be observed, in the construction of all grants made while such usage prevailed."

U. S. *v.* Perot, 98 U. S., 432.

The local usage and understanding in the District of Columbia, in respect to the right in controversy, are shown in various particulars.

1. *By common reputation.*

It is conceded, at once, by the Brief, that as far back as 1835, individuals were to be found, who opposed such rights as it is the object of the present argument to establish.

But it is equally clear, upon the evidence, that up to that period, the right had been constantly asserted without objection, and that the prevailing current of opinion was afterwards in favor of its exercise.

Mr. *Joseph H. Bradley* testified as follows:

"The general reputation, so far as my knowledge, information, and belief (*extend*,)* was that proprietors of lots on the high ground fronting upon a street, the north side of which only was defined, had the privilege of wharfage annexed to said lots, and exercised it either with or without the permission of the Corporation, but the extent into the river of such right of wharfage was undefined, and would remain so until the plan of the City, in that particular, should be completed, and the first time that was disputed within my life, was between 1834 and 1836, when it was first called in question by Mr. Peter Force; but still there was not any divided reputation until about the year 1845 or 1846, when a report was submitted to the Council of the City of Washington, by Mr. James Halliday *et al.*—a committee—which gave rise to discussion on that subject."

Rec. IV, 1424–1425.

Again: "Until the period I have spoken of, I am not aware of any fact which produced the necessity for assertion of claim, as the right of the parties to the wharf was never, to my knowledge, questioned."

Rec. IV, 1425.

* This word, (Rec. IV, 1425,) by inadvertence omitted.

On cross-examination, the following was part of the evidence of the same witness:

"Q. Was this alleged claim of wharfage made by the owners of squares on the north side of Water Street, as appurtenant to the squares?

"A. I always so understood it, and that the transactions of the sales of property there embraced such claim.

"Q. Was the wharfage privilege claimed to be severable from the square and conveyable by deed separate from the square?

"A. I do not recollect any instance or any incident in which that question was raised.

"Q. Was the privilege appurtenant to every part of the square, or so claimed?

"A. As I understand, it was appurtenant to every lot on the north and east side of Water Street.

"Q. What effect on this claim of wharfage appurtenant was produced by the subdivision of the squares into lots? Did the back lots lose their proportion of the water privileges, or not?

"A. The claim was asserted as to lots fronting Water Street, and the subdivisions of such lots having fronts on Water Street, and confined to them." (Rec. IV, 1442–1443.)

The same line of inquiry was repeated.

"Q. Then, in your opinion, the effect of the subdivision of the squares by deed or recorded plat, would be to divest the owners of the rear lots of the right of wharfage, and to vest it exclusively in the owners of the front lots, without reference to the depth of said front lots?

"A. I do not give any opinion on the subject; but I have understood, and now understand, that the received construction of the grant of a lot fronting on Water Street, in whatever manner that lot was separated from the rest of the square, carried with it the riparian right of wharfage.

"Q. Did the general reputation you speak of attribute wharf privileges to all lots on the north side of Water Street, irrespective of their form, whether fronting on said

street by a straight line, or by a flattened corner or sharp corner?

"A. At the risk of being a little prolix, I will endeavor to answer that question. I speak of a reputation which was well recognized, at the time, attributing to each lot fronting on Water Street, where there was no street between such lot and Water Street, and whatever the angle * of incidence of such lot may have been, the right to erect a wharf in front of such lot, subject to such regulations as the Corporation of the City of Washington might prescribe." (Rec. IV, 1443–1444.)

"Q. Do you recollect whether or not public opinion was divided at that time, in 1835, on this subject?

"A. I do not recollect any period, until within a few years past, when, so far as I knew anything about public opinion, there was any divided public opinion on this subject, although there were individuals who disputed the right of wharfage as claimed, and at that time, and for many years after, I believe I knew almost every family in the City of Washington." (Rec. IV, 1448.)

This portion of the evidence, affecting *a question of public right*, is supposed to be admissible, as showing *common reputation* upon the subject.

1 *Greenl. Ev.*, §§ 128, 130, 139–140.

In *Drinkwater* v. *Porter*, 7 *Car.* and *P.*, 181, it was held, that, on an issue as to whether a particular place situate on the bank of a river, be a *public landing* or not, evidence

* By error, (Rec. IV, 1443,) "*angular.*"

may be received tending to show that, by common reputation, it is not a landing of that description.

Such evidence, if relating to a matter of public right, is properly admitted, notwithstanding a question of private right may also be involved.

Regina v. *Bedford*, 4 *El.* and *Bl.*, 535;

See *Davis* v. *Lewis*, 2 *Chit. R.*, 535.

The evidence need not point to a public right directly connected with the thing in controversy.

It may be applied circumstantially, and by showing the relation of the public right to other objects of the same or kindred character, and of similar situation.

Thus, the declarations of deceased copyholders as to the right of free warren over all the copyholds of the manor, being upon matters of public right, and claimed co-extensive with the manor, wherein all the tenants are interested, are admissible upon the question of free warren in any particular land within the manor.

Earl of Carnavon v. *Villebois*, 13 *M. & W.*, 332.

And, in order to prove that a particular tract of land is part of a manorial waste, acts of ownership exercised over a different parcel of ground lying upon a common highway, though not contiguous to the *locus in quo*, may be offered in evidence.

Simpson v. *Dendy*, 18 *C. B.*, 821.

No act of enjoyment, consistent with the reputation sought to be established, need first be made out.

1 Greenleaf Ev., § 130.

Reputation being receivable upon the question, whether a certain close forms part of a manor, the admissibility of such evidence cannot be affected by the absence of proof of any act of enjoyment exercised over that close.

Earl of Dunraven *v.* Llewellin, 15 Q. B., 791.

See Casey's Lessee *v.* Inloes *et al.*, 1 Gill., 430.

Lord Hale, in adverting to the circumstances under which private dominion over the sea-shore may be established, and after observing that such shore may constitute part of a manor, adds:

"And as it may be parcel of a manor, so it may be parcel of a ville or parish, and the evidence of that will be the usual perambulations, *common reputation*, known metes and division and the title."

De Jure Maris, Pt. 1, ch. 5; 1 Harg. L. T., p. 27.

It need scarcely be urged, that declarations made since 1835, cannot be regarded as made *ante litem motam*, and that they are, therefore, incompetent, as proof of *common reputation*.

1 Greenleaf Ev., § 131.

On the other hand, it is not sufficient to throw suspicion upon the titles of the appellants, in the present brief, to show that their claim has been questioned by individuals.

A long and uninterrupted enjoyment of right, is not to

be assailed by proof of occasional or temporary dissatisfaction sometime with the exercise of that right.

That the right has been constantly and openly exercised, in the face of agitation against it, may well be considered as strengthening that right.

In *Trustees of Brookhaven et al.* v. *Strong*, 60 *New York*, 58, question arose as to the exclusive right of fishery in part of the *Great South Bay*, at *Fire Island*, under patents emanating from the colonial governors of the province of New York. It was shown at the trial, that the town had exercised control over the fishery as early as 1750, and had since claimed, enjoyed and, substantially, maintained the same exercise.

On the other hand, there was evidence tending to show that the pretentions of the town had been, from time to time, not only disputed, but even actively resisted.

In commenting upon the latter evidence, the Court observe: "It can only be claimed to establish that dissatisfaction was evinced, and a show of resistance made to the claim of the town for exclusive control; but it appears, that in all cases of contest, the right of the town was maintained, and has been continuously exercised in various ways, by exacting payment from individuals, or by leasing the land, or otherwise. It is not necessary, in order to claim the benefit of the user, *that every person in the community should acknowledge the right.* It may be disputed, or even denied, as it was by the oystermen in 1744, and as it has been since by individuals, but this is of no moment, provided the claimants have always vindicated their right whenever an effort was made to dislodge them. Their possession was suffi-

ciently peaceable, if it was maintained without force, and by the ordinary remedies which the law afforded. Their long user and occupancy, though probably not a technical bar under the statute of limitations, on account of the nature of the property and the necessarily imperfect character of the possession, are sufficient to give the plaintiff the benefit of any presumption which may be legitimately indulged in to supply defects, if not a title by prescription." (P. 71.)

2. *By the superior value attached to property fronting on Water Street.*

This is exhibited in the testimony of William R. Riley, (Rec. IV, 1763,) Thomas W. Riley, (Rec. IV, 1809,) and William A. Boss, (Rec. IV, 1835, 1836, 1837.)

If, on this point, the weight of positive evidence were not obviously in favor of the wharf-owner, it would be difficult to understand, upon the assumption that the right of wharfing was appurtenant to those lots, why, in the eye of both buyer and seller, the value of the property should not be enhanced from the annexation of that right.

In respect to the understanding that the conveyance of lots lying on the north side of Water Street, carried with them the privilege of wharfing opposite the same, out into the river, Mr. *Joseph H. Bradley* was examined as follows:

"Q. State whether or not purchases have been made and

values paid, in respect to such property, upon that understanding and belief.

"A. So far as I know, am informed and believe, such purchases were made with that understanding, as affecting the value of the property, and I can mention individual cases, if desired, within my own knowledge. Referring to the map of the City, I recall squares 329, 356, 390, 391, 472, and the whole of square 473." (Rec. IV, 1428.)

Again:

"Q. State, if you please, whether there has been difference in value, in respect to land lying in the neighborhood of the river, in favor of such portions of it as are bounded by the north side of Water Street.

"A. There was, always, as long as I had any knowledge of the value of land in that portion of the City, with the difference in favor of lots bounded on the north side of Water Street.

"Q. To what has such difference been attributable?

"A. To the claim of building wharves opposite those lots as appurtenant thereto." (Rec. IV, 1435.)

To the same effect, was *Mattingly*. (Rec. IV, 1468.)

3. *By the investments made on the faith of the annexation of the riparian privilege to lots lying on Water Street.*

On cross-examination, in answer to the inquiry whether he knew of any conveyances from the heirs of Notley Young, conveying wharfing privileges as appurtenant to their lots, Mr. *Joseph H. Bradley* replied as follows:

"I cannot recall now any deeds executed by *Notley Young's* heirs or devisees, except a conveyance to *George Page*, and the allotment of Mrs. *Farley* under the will. But I was attorney for *Ben* and *Nicholas Young*, and was aware of the fact that they did convey lots bounded on Water Street, and I know that in these conveyances as well as the assignment to Mrs. *Farley*, for her benefit, it was clearly understood between the parties, buyer and seller, that wharfing privileges did pass under the description of appurtenances to those lots, in the deed."

Rec. IV, 1442.

The truth is, there is scarcely one, if there be any, wharfing site, unoccupied, between the Long Bridge and the Arsenal Grounds. (Rec. IV, 1861, 1869.)

4. *By the constant claim to, and unobstructed exercise of, the right of wharfing, by the owners of property lying on the north side of Water Street.*

It abundantly appears in the record, that the privilege of wharfing out into the Potomac, opposite the lots lying on Water Street, has been claimed and exercised, until recent years, without impediment, by the owners of many of those lots, since the very foundation of the City, in divers instances, under conveyances expressly transferring the riparian right, but in all cases, under the assertion of title to that right, as appurtenant to the lots themselves. (Rec. IV, 1426, 1436, 1472, 1763, 1765, 1809, 1813, 1816, 1826, 1831, 1847.)

So open was the claim to this right, that, when the City

had failed to exercise the power conferred by its charter, "to regulate the manner of erecting" private wharves, *Kennedy*, claiming to be owner of lot 1 in square 329,* fronting on Water Street, and desiring to erect a wharf in front of his property, applied, at May Term, 1829, to the Circuit Court for this District, for *mandamus*, to compel the City to make such regulations, supporting his motion, by affidavit, to the effect, that he had applied to the corporate authorities, for leave to build a wharf on that lot, and, also, for directions to such commissioners as the Mayor was authorized to appoint, in regard to the plan and construction of the wharf, all of which those authorities had refused.

Mr. Wallach, for the City, contended, in effect, that the right of regulation conferred by the charter, was to be exercised, or not, by the City, in its *discretion*, and was, hence, exempt from control by *mandamus*.

It having been contended by counsel for the Petitioner, that proprietors could "*not enjoy their rights*," in advance of such regulation by the City, *Walter Jones*, also for the City, besides insisting upon the point raised by Mr. Wallach, contended that it was for the judiciary to determine those rights, and that the power of the City, in respect to private wharves, was only to regulate the manner of erecting them, not to limit the extent of them, and not "to interfere with the rights of the owners of the land adjoining the river."

And in the views of counsel for the City the court concurred.

Kennedy *v.* The Corporation, &c., 3 Cranch C. C., 595.

* His deed bears date February 26, 1830. (Rec. IV, 1374, 1394.)
The title, as frequently happened, was retained, perhaps, by the vendor, until the full payment of the purchase money.

Had square 329, because situate on the north side of Water Street, been conceived by counsel for the City, to possess no privilege of wharfing on the south side of that street, it is impossible to believe, that the position would not have been assumed in argument.

Mr. Jones had been, for twelve years, owner of square 300, (Rec. IV, 1984,) situate on the north side of Water Street, and was perfectly familiar with the incidents which were understood to belong to property thus located.

He had been the attorney of the United States for this District, at least from November, 1804, (1 Cranch C. C., 186,) to June, 1820.* (2 *id.*, 214.)

At April Term, 1823, he had conducted the argument for the Government and for the City, before the Circuit Court, in Van Ness *v.* United States, (2 Cranch C. C., 378,) styled, on appeal, Van Ness *v.* The City, in this court, where he appeared, for the corporation, (4 Pet., 243.)

Had there been no express mention of riparian privileges, had there been nothing whatever, denoting their existence, in conveyances of real property, in the land of Notley Young, situate on the north side of Water Street, the rights of the grantees in those conveyances, if such privileges were, indeed, incidental to the land, would not be affected, in law, by the omission.

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* Mr. Jones, of Virginia, had intermarried with a daughter of Attorney-General Lee.

He had participated, at August T., 1801, in the argument before this court, of Wilson *v.* Mason, 1 Cranch, 45, and had been counsel in, (amongst numerous other cases in this court,) Martin *v.* Hunter's Lessee, 1 Wheat., 313; McCullough *v.* State of Maryland, 4 *id.*, 362; Vidal *et al.* *v.* Girard's Ex'ors, 2 How., 143, and Patterson *v.* Gaines, 6 How., 574, his last reported appearance in this court being, as is believed, at Dec. T., 1855, in U. S. *v.* Jones, 18 How., 93.

Of all the early lawyers in the District, he ranks, by tradition, *facile princeps.*

The express alienation of the riparian privilege, in connection with a given description of property, through a long series of years, might justly furnish a strong presumption in favor of the existence of the right thus openly asserted and specially transferred.

But it does not follow that the opposite presumption should arise, even in the absence of express grants of the wharfing privilege. For, without any specific mention of such privileges, they might still be included in the known and settled terms which belong to all formal deeds of conveyance. Their omission would be readily explained by the influence of long established precedent, from which, in conveyancing, scarcely less than in pleading, we ought not to depart, it has been said, "without good reason or urgent necessity."

Indeed, as we have already seen from the testimony of Mr. *Jos. H. Bradley*, "it was clearly understood between the parties, both buyer and seller, *that wharfing privileges did pass under the description of appurtenances to those lots in the deed.*" (Rec. IV, 1422.)

Of the 18 Squares, on Water Street, Carved From the Land of Notley Young.*

No. 233.

Though this square was returned, December 14, 1793, as bounded by Water Street, (Rec. III, 1040,) that street, it appears, has not been constructed in front of the square, (*Id.*, 1016, 1020, 1023,) and the square itself seems not to

* The object of this examination, compelled by the Government. (Ch.)

have passed from or through the original proprietor, except by general devise, and a particular, and highly creditable conveyance, from sister to brother, prior to 1862. (Rec. IV, 1011–1012.)

See the title, at large, to this square.
Rec. III, 1010 *et seq.*

S. E. of 267.*

November 25, 1808, appears the assignment of a Lease for part of this square, "with water privileges thereunto belonging."† (Rec. IV, 1373–1374.)

There is similar language in conveyances respecting this square, or parts thereof, down to 1838.
Rec. IV, 1373–1374.

The exhibition, at large, of the title to this square, was obviated by stipulation.
Rec. IV, 1966.

No. 270.

Greenleaf, August 19, 1795, had conveyed this square to *Duncanson*, (Rec. IV, 1973,) and the latter, September 1, 1796, requests of the Commissioners, permission "to wharve in front of" that square, and, also, of square 300, embraced in the same conveyance. (Rec. VII, 2202.)

* Often, but inaccurately, denominated 267 and S. 267.

† That there were two wharves, as early as 1836, opposite this square, seems very certain. (Rec. IV, 1944.)
The record does not show the date of their erections.

By various deeds, (Rec. IV, 1972–1978,) title to square 270, became, early in 1817, vested in *Peter Lenox* (Rec. IV, 1978.)

Nov. 25, 1832, Mr. *Lenox* devises square 270, the E. ½ thereof, (calculated by front feet,) on Water Street, "*and the water privileges* appurtenant thereto," to his son *William*, and to his son, *Walter*, the W. ½ of that square, similarly calculated, with " the water privileges appurtenant thereto." (Rec. IV, 1978, 1980, 1981, 1984.)

See the title, at large, to this square. (Rec. IV, 1972, *et seq.*)

Square 300.

The application of Duncanson, on September 1, 1796, for permission to wharf in front of this square, has been noticed above, in connection with square 270.

But the abstracts of early conveyances* in square 300 found in the record, disclose nothing in relation to water privileges. (Rec. IV, 1973 *et seq.*, 1984 *et seq.*)

Square 329.

February 23, 1828, Notley Young† *et al.* to *Grammer*,

* They were intended, in general, merely as proof of title to *lots*, and not prepared, by counsel on the present brief, who omitted to furnish, as he had intended at least to furnish, the precise terms of the conveyance, of February 3, 1817, from Overton Carr, Trustee, to Walter Jones, (Rec. IV, 1984.)

See the conveyances by that Trustee of squares 270, (Rec. IV, 1374, 1987,) 473, (*Id.*, 1377,) and 504, (*Id.*, 1372,) amongst others.

† When the name of Notley Young appears connected with any transaction, after April 9, 1802, it must be taken to signify some descendant of the original proprietor, whose Will was, on that date, admitted to probate. (Rec. IV, 2000. *Et passim.*)

part of this square, with "water privileges and rights thereunto belonging." (Rec. IV, 1374.)

Conveyances in this square, importing the connection with the same, of like privileges, are those of March 24, 1829, (Rec. IV, 1374,) February 26, 1830, (Rec. IV, 1374, 1994,) March 20, 1830, (Rec. IV, 1374, 1994,) May 10, 1830, (Rec. IV, 1374,) January 21, 1831, (Rec. IV, 1374,) January 25, 1831, (Rec. IV, 1374, 1375, 1995,) October 20, 1836, (Rec. IV, 1375,) October 28, 1836, (Rec. IV, 1375,) and June 18, (Rec. IV, 1998, June 8,) 1839. (Rec. IV, 1375.)

See the title, at large, to this square. (Rec. IV, 1991 *et seq.*)

Square 356.
October 11, 1802.

Nicholas Young conveys this square, in fee, (subject to an outstanding estate for life,) describing the square as "*on Potomac River.*" (Rec. IV, 1376, 2007.)

In November, 1830, (the deed being recorded on the 10th of that month,) *Phineas Bradley*, who had acquired the square on June 20, 1820, (Rec. IV, 1376, 2007–2008,) conveys one-half thereof and of "the water rights and privileges to the same belonging or in anywise appertaining," unto *William A. Bradley*, (Rec. IV, 1376, 2008,) his son (Rec. IV, 1450.)

On February 26, 1838, there is a deed of trust from William A. Bradley, for one undivided moiety of this square, "with the buildings, wharves, rights, privileges, and appurtenances to the same belonging or appertaining." (Rec. IV, 2008.)

The Will of Phineas Bradley, dated December 16, 1842, and probated March 7, 1845, devises "my one-half of square 356, together with my one-half of the warehouse, and my one-half of the wharf or wharves connected with said square 356." (Rec. IV, 1376–1377, 2008.)

See the title, at length, to this square. (Rec. IV, 2006 *et seq.*)

Square 390.

December 1, 1832. Notley Young *et als.* convey certain lots in this square, to *William A. Bradley*, with "the rights of way *and of water*, and all the privileges and appurtenances." (Rec. IV, 1375.)

See the title, at large, to this square. (Rec. IV, 2013 *et seq.*)

Square 391.

A bill having been filed against Greenleaf and others, on September 27, 1825, for a sale of this square, there was, on May 11, 1832, decree accordingly, and appointing *Forrest*, Trustee to make sale. (Rec. IV, 1376.)

The subdivision (Rec. IV, 1375,) of this square made by the Trustee, is irregularly placed in the Record, but it exhibits the square as extending from Water Street, *to the channel of the Potomac.* (Rec. IV, 1376.)

It was sold, in 1838, by the Trustee, to *Witliam A. Bradley.* In the same year, the sale was confirmed by our local court, and conveyance was made by the Trustee, accordingly. (Rec. IV, 1376.)

See the title, at large, to this square. (Rec. IV, 2022 *et seq.*)

Square S. 415.

Nicholas Young, by will, dated July 21, 1826, and probated November 10, 1826, devises square S. 415, "*which*," in the language of the Will, "*is a water square.*"
Rec. III, 1032.

See the title, at large, to this square. (Rec. III, 1030 *et seq.*)

Square W. 471.

October 28, 1794, Notley Young, (original proprietor,) conveys this square to Greenleaf, "with all the ways, *waters*, rights, privileges, advantages and appurtenances." (Rec. III, 1047.)

August 7, 1795, Greenleaf, conveys to Robert Morris, the same square, "with all and singular, the ways, *waters*, water-courses, sources, rights, privileges, hereditaments and appurtenances." (Rec. III, 1048; IV, 1377.)

On July 31, 1830, are conveyed, under valid title, certain squares in the city, "including the square on the Potomac River, west of square four hundred and seventy-one."
Rec. III, 1050.

See the title, at large, to this square. (Rec. III, 1044 *et seq.*

Square 472.

Certain conveyances in this square have been already examined, in connection with the contention that the annexation of the riparian privilege to this square, should be presumed.

See the title, at large, to the square.
Rec. IV, 1361–1369, 1380, 1400; VII, 2390–2393.)

Square 473.

On April 10, 1817, Overton Carr, Trustee, conveys this square to Samuel Elliot "with ways, *water, water courses*," &c. (Rec. IV, 1377.)

On June 6, 1825, certain Trustees for sale, under proceedings in equity in the Circuit Court for this District having subdivided* this square into six lots, (Rec. IV, 1377,) sell, by "front feet on Water Street," two of the lots, to *William A. Bradley*, and the residue, to James Greenleaf, such sales being finally ratified by that Court, on December 2, 1828. (Rec. IV, 1378.

The Trustees conveyed, on December 30, 1835, (under arrangement with Greenleaf,) four of the lots to the *Bank of Washington*, and, on November 30, 1839, two of the lots to *William A. Bradley*, (Rec. IV, 1378,) the conveyances reciting, however, nothing specially as to riparian privileges, and being delayed, with reference to the date of sales, it may justly be supposed, until full payment of the purchase money.

See the title, at large, to this square. (Rec. 1401 *et seq.*)

* The subdivision, though duly appearing in those proceedings, was not recorded in the office of the Surveyor of the City, until November 16, 1839. (Rec. IV, 1402.)

Square 503.

Mention has already been made of the agreement, on November 9, 1796, of Morris and Nicholson to sell to one *Bickley* "a certain water-lot," in this square, (answering the description of what would now be lot 12,) "running * * * to the water of the Potomack, or so far as the plan of the City will allow, with the right of wharfing according to the rules of the City." (Rec. IV, 2039.)

We have seen, also, that a certain wharf had been erected opposite part of square 503, and had become the property of John Nicholas, who, on September 30, 1796, had requested of the Commissioners, in effect, to cause it to be officially ascertained, whether the location of such wharf was conformable to the Building Regulations of July 20, 1795, that the wharf is that which appears on the Washington Map of 1797, (Rec. V, immediately after p. 118,) and that which was surveyed by Nicholas King, on April 14, 1797. (Rec. V, second plat from p. 120; VI, p. 268.)

In this square may be mentioned, also, the conveyances following:

(1.) Sept. 23, 1818, *Saml. Elliott, Jr.*, to *Henry King*, lots 13, 14, and 15, in this square, "with the *water privileges appertaining*" thereto. (Rec. IV, 1369.)

(2.) July 23, 1821, *William* (then Chief Judge,) *Cranch, Greenleaf et al.* to *Andrew Bartle*, lots 14, 15, and 23, in the same square, "together *with the privileges of wharfing from the west side of west Sixth street* thereunto belonging, and, also, *the privileges of wharfing* in like manner, which appertain to lot numbered 16, in the same square,

(making together 144 feet *in breadth of wharfing privileges.*)" (Rec. IV, 1369–1370, 2059.)

(3.) July 20, 1821, *Saml. Elliott, Jr.*, to *Andrew Bartle*, "All the water privileges belonging and appertaining to lot 16, in square 503, in the said City of Weshington, measuring 48 feet in front of the river Potomac, immediately west of west sixth street, (which is the western boundary of said lot,) and extending the same width of 48 feet unto the said river;" also a right of way to be extended west in the direction of a certain alley, "as far out as any wharves shall be built." (Rec. IV, 1370.)

(4.) August 15, 1821, *Henry King* to *Andrew Bartle*, lots 14 and 15, in the same square, "with all the water privileges belonging and appertaining thereto." (Rec. IV, 1370.)

(5.) March 28, 1839, *Andrew Bartle* to *Andrew B. McLean, in like terms*, the property and wharfing privileges mentioned in conveyance 2, above. (Rec. IV, 1370, 2059–2060.)

(6.) August 19, 1842. *Andrew B. McLean* conveys to *William H. Gunnell*, lots 14, 15, 22, &c., in the same square, "with the rights, privileges, and appurtenances," "and all the privileges of wharfing and water privileges belonging and appertaining to lot 16, in said square, making together 144 feet in breadth of wharfing privileges." (Rec. IV, 1371.)

On January 29, 1846, *William H. Gunnell* conveyed to the *Corporation of Washington*, the above mentioned lots and "the privileges of wharfing, and water privileges belonging and appertaining to lot 16," "making together 144

feet *in breadth of wharfing privileges.*" (Rec. IV, 2060-2061.)

And, on March 30, 1853, the City conveys the same lots, to John Van Riswick, with "all the privileges of *wharfing* and *water privileges* belonging and appertaining thereto, and to lot numbered sixteen (16), in said Square, together with a right of way along a twenty feet alley lying to the north of said premises and from the said alley in the same direction west of Sixth Street, *as far as wharves shall be built into the Potomac River.*"

Rec. IV, 2061.

See the titles, at large, to certain of the lots in this square (Rec. IV, 2031 *et seq.*)

Square 504.

This square contains five lots fronting on Water Street, (Rec. VI, 261), but the conveyances in the record which expressly refer to any of those lots, embrace only lots 11, 12 and 13. (Rec. IV, 1372.)

There are but two of such conveyances, of date prior to 1844.

On April 10, 1817, Carr, trustee, conveys to Samuel Elliott, Jr., the above lots 11, 12 and 13, with ways, *waters, water courses,*" &c.

And Elliott, Jr., on September 29, 1821, having made a general conveyance of all his property to certain trustees, *these*, on December 30, 1835, conveyed the above three lots, (without the use, however, of terms specially indicative of water rights, or riparian privileges,) to the Bank of Washington. (Rec. IV, 1372.)

The charter of that bank, to continue, originally, for ten

years, by act Cong. February 15, 1811, (2 Stat., 625, 629,) had been long kept alive by further legislation, (6 Stat., 243; 3 *Id.*, 618; 5 *Id.*, 1, 69, 232,) but would expire on July 4, 1844. (5 Stat., 449, 451.)

Hence, the two conveyances of the above three lots on July 3, 1844. (Rec. IV, 1372.)

Square 505.

Notley Young, original proprietor, devised this square to his daughter, Eleanor, and there was no conveyance of it, until September 13, 1837, when it was deeded by her heirs at law, to *Byington*, but without language necessarily importing water rights, or riparian privileges. (Rec. IV, 1379.)

Square 506.

October 28, 1794, Notley Young, original proprietor, conveyed this square, amongst other squares, to James Greenleaf, with ways, *waters*, rights, privileges, advantages and appurtenances. (Rec. IV, 1379.)

This, and other squares, were conveyed, on September 12, 1795, by Greenleaf and others to Duncanson, with ways, *waters*, water courses, &c. (*Id.*, *ib.*)

Squares S. 506, *and S. of S.* 506.

The latter of these squares passed along with square 506, to James Greenleaf, under the above deed of October 28, 1794, (Rec. IV, 1380,) and as square S. of 506, had fallen to Notley Young, on division, and as Greenleaf, in 1796, was owner of that square, (6 Pet., 303, 9 *Id.*, 292,) it may be fairly assumed, though the record does not so declare, that

square S. of 506 was also embraced in the conveyance of October 28, 1794.

Indeed, considering the relative situations of the three squares, and the extent of the transaction involved in the conveyance in question, the presumption appears complete.

6. *The wharves opposite squares* 472 *and* 473 *have been taxed as improvements belonging to those squares.*

The payment of taxes by the wharf-holders, is certainly strong evidence of their claim of right to the wharves.

Ewing *v.* Burnet, 11 Pet., 54.

Fletcher *v.* Fuller, 120 U. S., 552–553.

And the mode in which taxes upon these wharves have been imposed and assessed by the public, affords no feeble recognition of the justness of their claim.

The method of taxation, between 1861 and 1871, as to square 472, (Rec. IV, 1492–1498,) and, from 1865 to 1871, as to lots in square 473, (Rec. IV, 1858–1859,) has been exhibited in the Record, for purposes of illustration.

It cannot be supposed, that in dealing with these squares, during their ownership by the appellants or by those under whom the appellants claim, the local authorities adopted a mode of taxation different from that which had been observed while the property remained in the hands of other proprietors.

Nor is there any reason to believe, that, in taxing the particular wharves connected with these squares, as improve-

ments belonging thereto, the Corporation pursued a policy at variance with its ordinary method of proceeding.*

In the absence of evidence to the contrary, it must be presumed, that the taxation of the wharves in question, as improvements belonging to the squares with which they were connected by title, was only in accordance with the usual course of official action in the City.†

It may be truly said of these wharves, in the language of *Green*, C. J., that " they have been held and enjoyed as private property, and have been taxed as such, without a doubt being entertained as to the validity of the title."

Gough v. *Bell*, 2 *Zabr.*, 464–5.

The cases before this court reported in 109 U. S., 672, had been determined in the court below, on June 28, 1880. (McA. and Mack., 285.)

The counsel for the defendants below, and, on appeal, one of the counsel for the appellees, here, (McA. & Mack., 285, 109 U. S., 674,) was the official legal adviser of the District, and, as such latter, on August 18, 1875, and to avoid any further admission that might be supposed to arise from the taxation of wharves, upon Water Street, recommended that they cease to be assessed. (Rec. IV, 1727–1728.)

* And *this*, notwithstanding the conclusions announced, in 1846, in the Report of a *Committee of Police*, of the lower Board of the City Councils, (Rec. VII, 2313,)—a Report, not even dignified, so far as the Record discloses, with the notice of a moment.

† It could not, of course, be expected, that counsel below, if at all able to furnish the tax-bills, through a long series of years, relating to the property represented in the present brief, would have deemed it material, or even becoming, to do so.

7. *The Corporation of Washington itself became the purchaser of wharfing privileges appurtenant to lots lying on the north side of Water Street.*

On March 28, 1839, *Andrew B. McLean*, through various mesne conveyances, became the owner of lots 14, 15, 22, and 23, in square 503, with the privileges of wharfing belonging to the two first mentioned lots, and also to lot 16 in the same square, "making together 144 feet *in breadth of wharfing privileges.*" (Rec. IV, 1370, 2059, 2060.)

On August 19, 1842, *McLean* had conveyed the above lots, with *water privileges, and the wharfing privileges* belonging to lot 16 in the same square, to *William H. Gunnell.* (Rec. IV, 1371.)

On January 29, 1846, *William H. Gunnell* conveyed to the *Corporation of Washington*, the above mentioned lots and "the privileges of wharfing, and water privileges belonging and appertaining to lot 16," "making together 144 feet *in breadth of wharfing privileges.*" (Rec. IV, 1371, 2060–2061.)

By Acts of Counsels, of May 22, 1852, and August 5, 1852, the Mayor was authorized to make sale of the wharf.
Appx. to Def's Arg., 93.

*John Van Riswick** became the purchaser.

* One of the members of the Police Committee of the lower Board, in 1846. (Rec. VII, 2314.)

By act of the City Councils of September 17, 1852,* the sale to Van Riswick was ratified and confirmed, and the Mayor was authorized to convey, by deed, to the purchaser, all the right, title and interest of this corporation, in and to the said lots and wharf, as the same were conveyed to this corporation by William H. Gunnell, by deed bearing date the 29th day of January, 1846."

And in pursuance of this authority, on March 30, 1853, the Mayor, in fact, conveyed to *John Van Riswick*, all the above-mentioned lots, "and the privileges of wharfing and water privileges belonging and appertaining thereto, and to lot 16 in said square." (Rec. IV, 1371, 2061.)

8. *The Corporation of Washington never at any period, prior to the year* 1863, *claimed or exercised riparian privileges, except opposite public reservations and at the ends of the public streets.*

In pursuance of the powers conferred by its charters, the City, indeed, *regulated the manner of erecting* private wharves on the Potomac.

It claimed no further authority over the wharfing sites in front of private property.

The testimony of Mr. *Joseph H. Bradley*, was, in part, as follows:

*By stipulation, the municipal ordinances are to be read and referred to, at pleasure.
(Rec. IV, 1361.)

"Q. State whether or not, within the period of your recollection, and prior to the year 1867, the City has asserted any claim to the riparian privileges lying opposite private property fronting on the North side of Water Street?

"A. Never, as far as I know and believe, except in regulating the mode of erecting, and the rates of wharfage, at private wharves, as granted to it in its charter.

"Q. State whether or not, within the same period, any such right has been claimed or asserted, to your knowledge, by the United States, or its officers.

"A. Not to my knowledge, nor did I ever hear of such a claim." (Rec. IV, 1429.)

Again:

"Q. State, if you please, whether or not you know, or have ever heard, of any license granted since the first charter of the City, down to the year 1866, by the Corporation of the City of Washington, to any person to build a wharf on the Potomac opposite private property lying on the North side of Water Street, unless such person was owner, or claimed to be the owner, or acted under the leave of the owner, of such private property.

"A. I never knew or heard of any such case." (Rec. IV, 1433-1434.)

Further:

"Q. State, if you please, how, when at any time the City wanted a wharf for municipal purposes, it proceeded to obtain it."

(Objected to.)

"A. I have no recollection of but one instance, in my personal observation, of that kind. In that instance, they purchased a wharf from William H. Gunnell, opposite square 503, and, to the best of my recollection, the ground to which it was claimed to be appurtenant." (Rec., 1434.)

Id., pp. 34–35.

Part of the cross-examination of the same witness, was as follows:

"Q. Did general reputation attribute any wharfing rights to the United States or to the Corporation of the City of Washington?

"A. General reputation attributed to the Corporation of Washington, the right to occupy wharves or docks, the water and ground opposite, at the terminus of the several streets running north and south, and, also, to the United States, riparian rights of what we call Greenleaf's Point, or the Arsenal Grounds, as they formerly were before they were enlarged, and the United States certainly exercised that right. They built there." (*Id.*, pp. 59–60.)

In confirmation of this testimony, reference is made to the following enactments of the City, passed at the dates noted below:

Nov. 10, 1806.—Wharf to be erected "*at the south end of Seventeenth Street west.*" (5 *Council Laws*, p. 9.)

Dec. 3, 1808.—Mayor to rent "wharves *at the ends of* Twelfth and Seventeenth Streets west, on Tyber Creek." (7 *Id.*, p. 20.)

May 22, 1821.—Citizens "not being wharf owners," to be appointed to report plans for erecting wharves. (17 *Id.*, 137.)

Nov. 23, 1823.—Lease of slip "*in Sixth Street* east from the channel." (21 *Id.*, 36.)

March 29, 1825.—Fish wharf "*in* Fifteenth Street west," to be rented. (22 *Id.*, p. 30.)

Nov. 7, 1826.—Wharves "*at the termination of* Third and Fourth Streets east," to be rented. (24 *Id.*, p. .)

April 2, 1829.—Wharf "*at termination of* Seventeenth Street west," to be rented. (26 *Id.*, p. 62.)

July 20, 1830.—Wharfage to be collected "at wharves owned by the Corporation, *at the termination of* Third and Fourth Streets east." (28 *Id.*, p. 41.)

May 20, 1837.—Occupation and use permitted of wharf "at the southern *termination*" of 17th Street west. (Rec. VII, 2335.)

May 26, 1837.—Wharf "*at the lower end of* Eleventh Street, and all other wharves and sites belonging to the Corporation," to be rented.

April 13, 1838.—Fish dock established "at wharf *at southern termination of* Eleventh Street east." (33 Council Laws, 315. *See Id.*, 430.)

May 31, 1839.—Permission given to erect a stone wall on Water Street "*at the termination of* H Street south." (Rec. VII, 2336.)

May 26, 1847.—"Wharf *at the lower end of* Eleventh Street," and other wharves and sites belonging to the City, to be rented. (34 Council Laws, 206.)

Dec. 2, 1850.—Appropriation to repair Corporation wharf "*at the foot of* 3d Street."

May 16, 1851.—To reconstruct Corporation wharf "*at the foot of* New Jersey Avenue."

Dec. 2, 1857.—Permission to *Morgan et al.* to construct "wharf *at the foot of* G Street north."

As, in America, a century ago, cities, if indeed able, were not expected to compete with private enterprise, the reservation to the city of Washington of the riparian privilege opposite public reservations, and opposite the termini of streets ending in Water Street, was sufficient—is adequate, at this moment—for every public requirement.

The limitation, at Baltimore, and at Georgetown, of

municipal wharfing privileges, to the *terminations* of streets, has already been considered.

(Ante, pp. 183, 186.)

In the plan of Water street approved by President Van Buren, on February 22, 1839, the wharfing privilege is assigned to the public, only in front of what are there treated as *public Reservations* and at the *ends of streets** terminating towards the Potomac, in Water Street.

The Commissioners, in their communication to the President, of July 24, 1795, respecting their regulations for the building of wharves, "beg leave, also, to remark that no wharves, except by the public, can be erected on the waters *opposite the public appropriations*, or on the *streets at right angles with the water*." (Rec. VI, 182.)

By act of the Legislature of *Georgia*, approved June 9, 1761, certain squares were reserved, on laying out the City of *Savannah*, for the use of the public, and it was further enacted that "the water-lots *at the end of every street* * * * shall be deemed and held and reputed as public lots and land and reserved for the use of the public only."

Watkins' Laws of Georgia, 74.

Each of the departments into which the Constitution has

*Streets, which passed to the Government, free of charge, are *never* confounded with property for which the United States must pay the original proprietor, at the rate of £25, per acre. (Record, *passim.*)

Acts Cong., July 25, 1848, (9 Stat., 250, 725,) and all other acts of Congress bearing, in anywise, whatever, upon the subject.

divided the government, became committed to the principle for which the wharf-owner now contends.

From 1794, down to 1868, when the Chief of Engineers of the Army was persuaded* to issue to *Pettibone*, license to erect wharves opposite square 300, (Rec. I, 160; IV, 1384,) neither the United States, nor any officer professing to act under their authority, attempted any interference with the private dominion claimed and exercised over the wharfing privilege on Water Street, between the Long Bridge and the Arsenal Grounds. (Rec. IV, 1433, 1483.)

(*a*) Reference has already been made, to the approval by the first President, of the Wharfing Regulations of July 20, 1795, and by Mr. Van Buren, of the ultimate plan and design of Water Street, in the year 1839.

(*b*) *The United States became the tenants of the wharf-owners, and paid rent accordingly.*

During the recent civil war, the wharves then opposite square 472, were in the occupation of the United States.

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*The readiness with which public authority is enlisted in behalf of private usurpations, when insidiously conducted in its name, has been strikingly remarked by a writer of great authority.

M. *Merlin*, in adverting to the extravagant claims asserted for the government to the sea shore, observes:

"A la vérité il est arrivé souvent que les gens avides d'envahir des propriétés particulières, se sont servis de ce prétexte pour en demander la concession au gouvernement, et qu'un zèle extrême à étendre les droits du domaine public, a fait accueillir ces demandes indiscrétes; mais toutes les fois que le gouvernement a été instruit par de justes réclamations, il est revenu sur ses pas et a condamné ses propres concessionnaires."

Questions de Droit. tome 14, p. 116.-*Rivages de la Mer.*

Mattingly states that they were rented from him, as agent of the *Potomac Steamboat Company*, by the government, and that he himself, as such agent, received the rent.

Rec. IV, 1474, 1475. See *Id.*, 1819–1820.

The rent was paid monthly, for about four years, and until some time after the close of the war. (Rec. IV, 1474.)

Other wharves on the Potomac were also rented by the government, from private persons, during the same period.

Rec. IV, 1475, 1954.

(*c*) *The government itself became the proprietor of water property by treaty with individuals.*

It has already been shown, that, when, in 1799, the United States desired to obtain a suitable site for founding a *Navy Yard*, they accomplished this object by obtaining from *Prout* and *Carroll* squares 853 and 883, in exchange for "*other water property.*" (*Ante*, pp. 115–116.)

(*d*) *The Reports made by the Commissioners, and by their successors in office, from time to time, to the President and to Congress, indicate the transfer to individuals of public water lots.* (*Ante*, 230–232.)

(*e*) *The wharves projecting from Water Street, if they were not lawfully held by individuals, could remain in such possession, only through grave official neglect and in the teeth of Congress.*

By act Cong. May 17, 1848, section 13, (9 Stat., 229,) it is thus, in reference to the city of Washington, enacted:

"And no open space, public reservation, or other public ground in the said city, shall be occupied by any private person, or *for any private purposes whatever.*"

By act Cong. June 30, 1864, (13 Stat., 412,) the Secretary of the Interior was authorized and directed to prevent the improper appropriation or occupation of any of the streets, avenues, squares or reservations in this city, belonging to the government, and to reclaim them, if unlawfully appropriated, and to report to Congress, at the commencement of its next session, his proceedings in the premises, together with a full statement of all such property, and how, and by what authority, occupied or claimed.

If the site of the riparian privilege, on the Potomac, from square 233 to the Arsenal Grounds, before their enlargement, was, in any degree, unlawfully occupied, why were not the provisions of these enactments enforced against the trespassers?

Surveys have been made, of the river front, under governmental authority, and communicated to Congress, with charts exhibiting the wharves erected on that front.

See the Kearney Chart of 1834. (Rec. V, second Map after p. 18.)

If these erections were mere usurpations, why was no step taken to abate them?

(*f*) *Congress, between* 1829 *and* 1875, *both years inclu-*

sive, created five Steamboat Companies, to navigate the Potomac, to and from the city of Washington, and, under terms or circumstances, demonstrating that such Companies could reasonably accomplish the objects of their creation, only by becoming owners of lots on the north side of Water Street, between the Long Bridge and the Arsenal Grounds.

By act Cong. May 15, 1820, sec. 7, the Corporation of Washington was empowered to erect, repair, and regulate *public* wharves, and "to regulate the manner of erecting, and the rates of wharfage at, *private* wharves." (3 Stat., 583; Burch Dig., 20; Davis' Laws, 345.)

This provision was continued in force, by successive extensions of the City charter, under acts Cong. May 17, 1848, (9 Stat., 223,) May 28, 1868, (15 Stat., 61,) and April 7, 1869, (16 Stat., 8,) until the repeal of that charter, by act Cong. February 21, 1871, sec. 40. (16 Stat., 428.)

By act Cong. March 3, 1839, was incorporated the *Washington, Alexandria and Georgetown Steam Packet Company*, with power to "have and hold, purchase, receive, possess, enjoy, and retain, *lands*, rents, tenements, and hereditaments, goods, chattels, and effects, of whatever nature, kind or quality, so ever, *necessary for the objects" of its creation*, with general power of alienation and disposition. (6 Stat., 398.)

By act Cong. July 1, 1864, (13 Stat., 331,) had been created, as we have seen, the Potomac Ferry Company,

which, by sec. 3 of that act, was "authorized and empowered to establish and run a line, or lines, of vessels, propelled by steam or other power, between the cities of Alexandria and Washington, and (*sic*) other ports in the State of Virginia on the Potomac River, Chesapeake Bay, or the tributaries of the same."

Section 4 enacts—

"That the said Company is also authorized to *purchase*, *hold* and *grant* such *real estate* as may be *necessary* to carry into effect the purposes of this act, and to *build* all necessary docks, wharves, and buildings *thereon* for their own use; may transport passengers and freight of every description, subject to the rules and regulations and laws of the United States; * * * and, generally, may have and possess the rights and privileges usually possessed by similar corporations."

By Act Cong. March 25, 1870, was incorporated the *Washington Mail Steamboat Company*, which was empowered, by sec. 2, "to establish and run a line or lines of steamers between the cities of Washington and Norfolk and other ports," and, by sec. 3, "to buy, build, charter, or run, steamers, and to *purchase* hold and grant such real, personal or mixed estate as" might be necessary to carry into effect the purposes of the "act, and to build all necessary docks, wharves and buildings *thereon* for their own use," Congress, however, by sec. 4, reserving the power to alter, amend or repeal, at pleasure. (16 Stat., 78–79.)

By act Cong. May 4, 1870, (16 Stat., 97,) was incorporated the *Washington and Boston Steamship Company*,

which was empowered, by sec. 3, "to establish and run a line or lines of vessels, propelled by steam or other power, between the cities of Washington, Georgetown, Alexandria, Norfolk and other ports in the State of Virginia, on the Potomac river, Chesapeake bay, or the tributaries of the same, and Boston, in the State of Massachusetts," and by sec. 4, to *purchase*, hold and grant such real estate, not exceeding in amount one hundred thousand dollars, as might be necessary to carry into effect the purposes of "the act, and to build all necessary docks, wharves and buildings *thereon*, for their own use," Congress, under sec. 8, to alter, amend or repeal, at pleasure.

(5.) By act Cong. March 3, 1875, (18 Stat., 513,) was incorporated the *Inland and Seaboard Coasting Company** which, by sec. 2, was empowered "to run vessels propelled by steam, or other power, between the cities of Washington, Georgetown, Alexandria and New York, including the ports on the Potomac River and Chesapeake Bay, and the tributaries thereof," and "to *purchase*, hold and convey such real and personal estate as" might "be necessary to carry into effect the purposes of the act" and to "purchase or construct such *docks, wharves and buildings* as" might "be necessary for its own use."

Where were the five *steamboat* corporations, thus created by Congress, to obtain sites, at the City of Washington, adapted to the prosecution of their business?

The government has largely and successfully employed one of the volumes of the Record, in demonstrating, that,

* See ante, p. 7, note.

from a period anterior to the passage of the earliest of these enactments, no channel, suitable for commercial purposes, existed between the Long Bridge and Easby's wharf.* (Rec. II, 71, 72, 73, 74, 79, 81, 128, 147, 149, 188, 211, 223, 231–232, 302, 305.)

That Rock Creek could afford accommodations for such steam vessels as were contemplated in this legislation, was never, of course, conceived.

Some few lots there might, perhaps, be found, upon the navigable portion of the Eastern Branch, between which lots and stream no street had been delineated upon the Washington Map of 1797, but, in the year 1864, when the second of these corporations was created, as well as in 1875, when the last of them was enacted, the Eastern Branch was, practically, inaccessible, from the business and residential centres of the city.

And it must have appeared as reasonable to confine to that section, the depots of the steam railroads entering the capital, as to render that locality the exclusive landing-place of steamers expected to engage in the daily transportation of freight and passengers, and to constitute the *ferries* between neighboring cities.

The companies created by these enactments, it may well be supposed, would never have accepted their charters, under any impression that the wharves which they were empowered to erect must be located on the Eastern Branch.

But, three of the enactments expressly refer to the conduct of business "on the *Potomac River*," and none of them make mention of the Eastern Branch.

The companies empowered by their charters to operate lines of vessels "*on the Potomac River*," between Washington and Alexandria, were empowered, in legal effect, by

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*Foot of 26th and G streets n.w. (Rec. II, 277.)

their charters, to purchase wharfing sites, on that river, at Washington.

This analysis leaves, as the only land which can reasonably be supposed to have been in the contemplation either of Congress, or of the incorporators, in the charters above mentioned, *land which had belonged to Notley Young*, fronting on Water Street, between the Long Bridge and the Arsenal Grounds.

(*g*) *The federal judges in the District affirmed the right of the private owner.*

This decision was pronounced at Nov. T., 1838.

The case was thus:

Lots 8, 9 and 10 in square No. 1, upon division with *Robert Peter*, the original proprietor, on January, 1793, had fallen to the public. (Rec. VI, 235–236.)

Each of those lots, as appears from the Plat found in the present record, was entered upon the books of the Commissioners as bounded "*on the west by 28th Street west*," and this street intervened between the lots and *Rock Creek*.

In the month of May, 1793, (Rec. VI, 236,) the government sold the lots to one *Harbaugh*, who, in front of them built a certain wharf, and afterwards conveyed them, with the wharf, to the *Bank*.

The *Canal Company* had subsequently *condemned* for its use, under the authority of its charter, "*so much of the water privilege* of Rock Creek, as lay west of the lots in

question. The condemnation money was claimed by the *Bank*, as the grantee of *Harbaugh*.

It was urged, for the *Canal Company*, that "*Mr. Harbaugh never had any water privilege to those lots, because they were cut off from the Creek by 28th Street west, and as the street belonged to the United States, the water privilege belonged to them also.*"

For the *Bank*, it was contended that "the streets were conveyed to the United States only as highways, and did not deprive the riparian proprietors of their water rights."

And in support of this latter position, reference was made to the letter of *N. King* contained in *Burch Dig.*, 353, 359, to the *Wharfing Regulations of* 1795, (Ante, pp. 67–68,) and to the Act of Maryland of 1791, Sec. 12. (Ante, p. 6.)

Held, "that the title of *Harbaugh* to his wharf was good against the United States claiming under a private citizen," and that the condemnation money belonged to the *Bank*.

Chesapeake & Ohio Canal Co. v. Union Bank of Georgetown, 5 *Cr. C. C.*, 509.

The principle asserted in this adjudication, had remained undisturbed, until the year 1880.

Mack. & Mack., 285.

For forty-two years it had constituted the authoritative exposition of the local law.

And it is impossible to draw any solid distinction between the principle thus judicially established in 1838, and that for which the present appellants contend.

The first intelligence in the tribunal by which the above

case was determined, was that of Chief Judge Cranch,* who had participated in, if he had not actually rendered, the decree in Van Ness *v.* U. S., (2 Cranch C. C., 376,) affirmed, in this court, under the title of Van Ness *v.* The City &c., 4 Pet., 232.

Judge Cranch had been familiar with all the early transactions of the Commissioners.

He had signed, as witness, the informal division made between Notley Young and the Commissioners, on October 18, 1794, (Rec. III, 1047; IV, 2033,) and the certificate granted, on the same date, by the Commissioners, to Mr. Greenleaf. (Rec. IV, 2035; VI, 152.)

He had received, on November 1, 1796, a general power of attorney from Robert Morris, to deal with all the real estate of the latter, in the City. (Rec. III, 1048.)

He had been agent, also, for James Greenleaf. (9 Pet., 295. See Rec. IV, 2052.)

He had acted, in 1795, for Mr. Johnson, claiming under Greenleaf, square W. of 4, and was personally aware that the claim of Mr. Johnson had been rejected, on the distinct ground, that Square W. of 4, was *a water* lot, and that, under his contract of December 24, 1793, Mr. Greenleaf was not entitled to the selection of water lots, *except* in the land of Notley Young. (Ante, 169–110.)

While acting for others, he had, in 1821, received, (Rec. IV, 1369–1370,) and, also, made, (Rec. IV, 1370, 2059,) conveyance of property situate on the north side of Water

* He came here from Quincey, Mass. His father, Richard Cranch, had been the friend of Josiah Quincey, and of his parents.—Life Josiah Quincey, 82.—(Boston, 1868.)

Street, within the tract, formerly of Notley Young, with express grant of riparian privileges.

Though upon the decease of Commissioner Scott, (Rec. VI, 223–224,) Mr. Cranch, on January 13, 1801, had been appointed in his stead, (Rec. VI, 224,) he must have continued but a month, or so, at most, in that office, since we find him at April 9, 1801, an assistant judge of the Circuit Court for the District, (1 Cranch C. C., 11,) of which he became Chief Judge, in 1806.

Thus, it appears, that by the uniform course of dealing on the part of the Commissioners, by their express contract and its subsequent recognition, from the general idea of the public, by acts of admission and invitation on the part of the United States, by judicial decision, by the open and uninterrupted claim and exercise of right on the part of the private proprietors, and by long acquiescence on the part of the local and general government, and by their conjoint actions for *securing* that right, these privileges of wharfing were, for seventy years, established and respected.*

*Act October Term, 1889, this court express the opinion "that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use. For many years past a very large proportion of the beef which has been used by the people of the United States is the meat of cattle thus raised upon the public lands without charge, without let or hindrance or obstruction.

"The government of the United States, in all its branches, has known of this use, has never forbidden it, nor taken any steps to arrest it. No doubt it may be safely stated that this has been done with the consent of all branches of the government, and, as we shall attempt to show, with its direct encouragement."

Buford *v.* Houtz, 133 U. S., 326.

If the principle thus sanctioned, could be justly regarded as founded in mistake, it should now be too late to rectify the fault. For error itself ceases to be remediable, when time and practice have rendered it the rule of an entire community.

Communis error facit jus.

The assertion of authority, either by general or local government, over the riparian privilege connected with private property, in the City of Washington, is entirely of modern date.

Res memoranda novis annalibus atque recenti Historia.

It has already been shown that the first exercise of such authority, *in the name of the United States*, was under the license issued by the *Chief of Engineers* of the Army, to *Pettibone* on January 18, 1868. (Rec. I, 160.)

The first act *of the City*, which definitely asserted any such right, on the part of that Corporation, was contained in the Act of March 23, 1863, which empowered the mayor to lease "wharf sites in front of any sea wall" built or to be built by local authority. (Rec. IV, 2344.)

This enactment was passed during an extraordinary conjuncture in our national history.

And, as was observed by Mr. Chief Justice *Chase*, "the time was not favorable to considerate reflection upon the constitutional limits of legislative or executive authority."

Hepburn *v.* Griswold, 8 Wall., 625.

"It did not allow," says Mr. Justice *Davis*, "that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question."

Ex parte Milligan, 4 Wall., 109.

And see Boyd *v.* U. S., 621.

Great changes, moreover, were then taking place, in the extent and character of the population of the city. (Rec. IV, 1462.)

The precedent established by this enactment was followed, however, by the Acts of November 10, 1865, (Rec. VII, 2346–2347,) December 7, 1867, (*Id.*, 2347,) April 9, 1870, (Rec. VII, 2349–2350,) December 9, 1870, and January 16, 1871, all asserting corporate power over the wharfing privilege connected with private property on Water Street.

That the precedent itself was adopted without due consideration, it has been already attempted to establish.

As the Statute of Limitations of Jac. I, cap. 16, (Alex. Brit. Stat., 446,) except as altered, in respect of personal actions, by act of Maryland of 1715, ch. 23, (1 Kilty, Thomp. Dig., 287,) and (now,) by the repeal, in Rev. Stat. U. S. relating to the District of Columbia, sec. 466, re-enacted by act Cong., February 28, 1887, (24 Stat., 431,) of all exceptions in favor of persons "beyond the seas," (non-residents,) has always been in force in that District, and as the City of Washington, and the District of Columbia, as its successor, were subject to the first mentioned enactment, (Metrop. R.R. *v.* Distr. of Columbia, 132 U. S., 1,)

it was not in the power of the City, whatever its Councils might fulminate, to disturb ancient possessions on the south side of Water Street.*

Communication from Commissioners Scott and White to Nicholas King, on June 25, 1798.†

From the office of surveyor, Nicholas King, as we have frequently seen, had retired, on September 12, 1797, not without some previous want of harmony, it would seem, between himself and his official superiors. (*Ante*, p. 241, Note.)

He is found in the employ, as early as October 27, 1797,

* The bar from time, is also sufficient, in itself, to protect the wharves and other structures, represented by the present brief, from claims on the part of the heirs of Mr. Chief Justice Marshall.

† Mr. *Thornton* was not always in accord with his official associates. See,—

October 5, 1795, (Rec. VII, 2232,) his protest against the action of the Board upon the application of Mr. Barry.

August 16, 1798, his differences of opinion with Mr. White, in the conversation occurring, on that day, between those two Commissioners and N. King. (Rec. VII, 2253-2254.)

May 22, 1799, his protest against the action of the Board, upon the application of Mr. Walker. (*Id.* 2264-2265.)

May 31, 1799, his appeal, upon the subject last above, (*Id.* 2263,) to General Washington, who concurred in his views, (Rec. VI, 339,) as did, also, the second President. (Rec. VII, 2265.)

August 16, 1799, his protest last above, overruled by his colleagues, while having before them the correspondence between Mr. Thornton and General Washington, upon the matter embraced in such protest. (*Id.* 2266.)

October 28, 1800, his disapproval of, and declension to sign, the division then made of certain squares, by the Board. (Rec. VII, 2267-2268.)

of Samuel Davidson, (Rec. IV, 1530–1531,) one of the original proprietors, and on June 1, 1798, in that of Robert Peter, (Rec. VII, 2249,) another of such proprietors.

On June 25, 1878, *two* of the Commissioners thus addressed Mr. N. King:

"We are favored with yours of the 22nd instant, in behalf of Mr. Peter.

"When the Commissioners have proceeded to divide a square with a City proprietor, whether water or other property, they have executed all the powers vested in them to act on the subject. It appertains to the several courts of the State and of the United States to determine upon the rights which such division may give; any decision by us on the subject would be extra-judicial and nugatory; *of this no doubt, Mr. Peter, if applied to, would have informed you.**

* These were not nice terms to throw into the face of Mr. King, whose *information* was, certainly, equal, at least, to any which could be possessed, on the subject, by his employer.

Friction between Mr. King and the Commissioners seems to have continued.

Between himself and two of the Commissioners there occurred, on August 16, 1798, "a Conversation," sufficiently remarkable in itself, and of "the Heads" whereof he has left a "memorandum." (Rec. VII, 2253.)

On September 10, 1798, N. King, for his employer, enters this protest with the Commissioners:

GENTLEMEN: You have advertised the lots numbered three and four, in square ninety-nine, for sale. Mr. Robert Peter is interested therein, as original proprietor, and not having divided the same with you, he hereby protests against such sale of his property, until the division takes place. (Rec. IV, 1532.)

On January 29, 1799, as attorney for Mr. Peter, and in concert with certain of the original proprietors, or their heirs, he cautions the trustees, at their peril, to convey to the Commissioners, neither the streets nor the public appropriations. (Rec. VII, 2260–2261.)

On November 5, 1799, he opens a letter to the Commissioners thus:

"When I was at the Board last, on the business of Mr. Peter, it was your wish that every communication respecting property *should be in writing*. In conformity therewith," &c., &c. (Rec. IV, 1532.)

"With respect to Square No. 22, we do not conceive that it is entitled to any water privilege, as a street intervenes between it and the water; but, as there is some high ground between the Water Street and the Water, we have no objection to laying out a new square between Water Street and the Channel and divide such square, when laid out, so as to make it as beneficial to Mr. Peter and the Public as circumstances will admit." (Rec. IV, 1531; VII, 2250–2251.)

On August 6, 1798, Mr. King, as such attorney, addresses them as follows:

"During the long recess of the Board, I have gone so far into Mr. Robert Peter's accounts as to be ready to complete the Division of his property, on Mr. Blodgett's line, as soon as you can conveniently attend to that business.

"To get the other part of his property and Accounts into a similar state of forwardness, is what both him (*sic*,) and myself much wished; but, as your determination respecting the extent and bounds of the Water property, will materially affect such account, I hope the Board will take that matter into consideration and inform me of the result."

Rec. VII, 2252.

And was thus, and, to some extent, as on June 22, 1798, answered:

COMMISSIONERS' OFFICE, *7th Aug.*, 1798.

SIR: We have your letter of yesterday. We will at any [*time*] attend to the division of Mr. Peter's property on Mr. Blodgett's line or elsewhere. It has been the uniform opinion of Mr. Scott and Mr. White that the commissioners have no right to determine the bounds or extent of the water property attached to the squares or lots of this city.

We are, sir, y'r mo. ob't servants,

W. THORNTON,
A. WHITE.

Mr. NICHOLAS KING.

Rec. VI, 206; VII, 2252.

The communication from Messrs. *Scott* and *White*, of June 25, 1798, had been addressed to Mr. *King*, in response to his request, (June 22, 1798,) for information in respect to the bounds, dimensions and privileges of those parts of the City generally known as *water property*, a portion of which, lying on Rock Creek, had been assigned on division, to Mr. *Peter*, as original proprietor.

After referring, particularly, to squares numbered 1, 3, N. 4, 8, 9, 10, 12, S. of 12, 13, and W. of 14, respectively, Mr. *King* had said:

"The square No. 22, as at present laid off and divided with the Commissioners, does not extend to the channel by several hundred feet. If another square be introduced to the south of it, that square will be covered to a small extent with water, and the proprietors will want earth to wharf and fill it up with. It will be best, perhaps, therefore, to re-divide square No. 22, *and attach* the *low grounds to it.*" (Rec. IV, 204–205; VII, 2249–2250.)

It does not seem to be denied by the two Commissioners, that any of the squares, (save square 22,) mentioned by Mr. N. King, were entitled to the wharfing privilege.

Squares N. 4 and W. 14, and, also, square 13, in part, though the Record contains neither plats nor returns of those squares, appear, indeed, by the Washington Map of 1797, (Rec. V, immediately after p. 118,) to be bounded, on the west, by Rock Creek. Yet, many years before the date of this communication, squares 1, (Rec. VI, 235,) 8,* 9,† (Rec. VI, 237,) and 10,‡ (*Id.* 238,) had been returned

*Square 3, "if admitted," was "considered as water privilege, attached to the opposite lots in square No. 8." (Rec. VI, 249.)

†In connection with this square, appears the entry, "the west front is water property." (Rec. VI, 249.)

‡An entry, as to lots in this square, shows "water lots, No. 2 and 3." (Rec. VI, 249.)

bounded, towards the water, by 27th street, west. Square S. of 12 had been returned, on July 30, 1797, as bounded, in like direction, partly, by that street, and, partly, by Water Street. (Rec. III, 821–822.)

But it has already been shown, that, in many instances, prior to June 25, 1798, the Commissioners conceded the annexation of the riparian privilege to squares between which and the water a street was interposed, according to the returns of the surveyors. (*Ante*. 213–225.)

And, in no instance, until that date, had they manifested a contrary opinion.

It has also been already shown, that the Commissioners, after that date, conceded, in effect, the annexation of the riparian privilege to lots between which and the water a street intervened, according to the returns of the surveyors. (*Ante*, 225 *et seq*.)

In his letter of June 22, 1798, Mr. *King* had asserted no claim of wharfage as appurtenant to square No. 22.

His observations upon that square, were of a totally different character and involved totally different consequences.

He conceded that it did not "extend to the channel, *by several hundred feet*."

That a new square could, therefore, be laid out south of it, he was prepared to admit. But the introduction of this new square, would be attended with inconvenient results. It would "be covered to a small depth of water," and the proprietor thereof, would "want earth to wharf out and fill it up with." Hence, observes Mr. *King*, it will, perhaps, be best "to re-divide square No. 22, and attach the low grounds to it." (Rec. VI, 205.)

In reply, a majority of the Commissioners announce, that they "have no objection to laying out a new square, between Water Street and the channel, and divide such square, when laid out, so as to make it as beneficial to Mr. *Peter* and the public as circumstances will permit."

It is true, the two Commissioners take occasion to observe, that they do not conceive that square No. 22 is entitled to any water privilege, "as a street intervenes between it and the water."

This expression, however, must be applied with reference to the facts under which it was adopted, and which may be justly presumed to have occupied the minds of the Commissioners, at the time of its employment.

The case before them was not that of a square bounded by a street defined only by the margin of the stream, or even of a square between which and the water a street *only* intervened.

"*High ground*" lay "*between Water Street and the water*," opposite square No. 22.

There was enough intervening space for the Commissioners to lay out "a new square *between Water Street and the channel*."

See the Plats of this square. (Rec. V, fourth map next after p. 120; *Id.* map next after p. 124; *Id.* map next before p. 125.)

Now, under the deed of trust from Robert Peter to Beall and Gantt, any part of his land "*which shall not have been*

laid out in the said city," is to be by them to him conveyed, in fee, (Rec. V, 39,) a similar provision being contained in the deeds of trust, in general, executed by the original proprietors. (Rec. V, 43, 48; VI, 141; Burch Dig. 332.)

The fast land adjoining the water, unless thrown into the city, would be the property of Mr. Peter alone,* who might not care to have it excluded from the city, and left only within the District of Columbia, *in general*, the County of Washington having been first created by sec. 2 of act Cong. of February, 1801, (2 Stat. 105,) to be, by sec. 4 of act Cong. March 3, 1801, (2 *Id.* 115,) governed by a board of magistrates, answering the description of the Levy Court.

2 Cranch C. C. 659.

And the privilege of wharfing was naturally connected *with the fast land adjoining the water*, and not with square No. 22, which was topographically disconnected from the channel, first by Water Street, and secondly, for a distance of "several hundred feet," by such fast land itself.

Thus situated, square No. 22, could not with propriety be regarded a "*water lot*," nor possess the privilege of wharfing. (*Ante*, p. 217.)

But whatever the decision of the Commissioners, in 1798, either upon the general subject, or in reference to square No. 22, it cannot be applied to any of the property embraced

* The opposite, and, it is submitted, erroneous, view, is taken in the opinion below. (Rec. VII, 2541-2542.)

in the Contract made by their predecessors with *Morris* and *Greenleaf*, on the 24th of December, 1793.

For the same Commissioners who, in 1798, addressed to Mr. *King* the communication now under review, had clearly recognized the right of *Morris* and *Greenleaf*, under that Contract, to a selection of water lots *in the land of Notley Young*, as early as the 21st of February, 1795. (*Ante*, p. 218.)

And this they undoubtedly did, upon the plain ground, that *Morris and Greenleaf* had purchased, under that agreement, the public's share in that land, and, "of course," also, "*the privileges of wharfing annexed thereto.*"

In the communication addressed by N. King to President Jefferson, on September 25, 1803, the author of that communication refers to what he conceives to be the contradictory positions from time to time assumed by the Commissioners, as follows:

"In the month of October, two of the Board of Commissioners gave permission to Mr. Barry to build upon and occupy exclusively that part of Georgia avenue in front of square 771, notwithstanding the regulations they had so recently made.—(C.) An inspection of any of the maps will show the importance of this avenue to the commercial interests of the city. Its continuation is designated on them, and the quantity of earth from the eastern fork of the canal, which must be there deposited, will make it all

firm ground. This act of the board was protested against by one of the members.—(C.) Nothwithstanding the permission given to Mr. Barry, the commissioners in other instances, deny their power to do so. (See their letter to Mr. Law, on the 30th November, 1795, a copy of which is subjoined, E.) In the year 1798, there was a farther change in the opinion of the Board, for, in answer to the request made by the attorney of Mr. Peter, (one of the original proprietors of lands in the city lying on the Potomac, near Georgetown,) to know the extent of wharfing and water privileges attached to what were called water lots, and assigned to him on division, they say: 'When the Commissioners have proceeded to divide a square with a city proprietor, whether water or other property, they have executed all the powers vested in them to act upon the subject. It appertains to the several courts of the State and of the United States to determine upon the rights which such division may give; any decision by us on the subject would be extra-judicial and nugatory.' It is unnecessary to comment on sentiments like these, or state their effect on the minds of persons wishing to improve, yet cautious as to title, and the rights they acquire." (Rec. VI, 307–308; Burch Dig. 360–361.)

Inconsistencies of Individuals Opposing the Rights of Wharf-Owners.

(a) *Given.* (Rec. III, 1022; IV, 1778.)

Lenox owned square 270, (Rec. IV, 1978,) and, of the wharf opposite that square, Given had had charge for fifteen or sixteen years, and had desired to purchase the square with which the wharf was connected, but was dissuaded, upon

advice, in 1850, from Mr. Joseph H. Bradley, that some imperfection existed in the Lenox title to the property. (Rec. IV, 1783, 1785.)

Given, for thirty years, had been "*a merchant*," (Rec. III, 1022,) that is, a wood and coal man, (Rec. IV, 1957,) on the north side of Water Street, opposite square S.E. of 267,* the square, on that street, next east of the Long Bridge. (Rec. III, 1022, 1023; IV, 1781, 1938-1939.)

One of his partners, (Rec. III, 1022; IV, 1938–1939,) during part of such period, was owner of that square and of the wharf opposite thereto. (Rec. IV, 1966.)

Given was also lessee from individuals, of a wharf on the south side of Water Street, (Rec. IV, 1782,) in land formerly belonging to Mr. Young, when, in 1891, (Rec. IV, 1878,) the testimony of Given was delivered.

(*b*) *Gunton.* (Rec. VII, 2381.)

This witness testifying, on February 21, 1878, at the age of 87, *ex parte*, in 109 U. S. 672, had been President of the Bank of Washington, since 1835. (Rec. VII, 2381.)

Yet, that Bank, on December 30, 1835, had obtained a conveyance for an undivided moiety of the wharf then situate opposite part of square 503, (Rec. IV, 1372, 2052,) and, between that date and July 18, 1856, had acquired title to lots, or interests, in squares 300, (Rec. IV, 1984–1985,) 473, (Rec. IV, 1402–1403,) 503, (Rec. IV, 1372, 2052,) and 504. (*Id.* 1472.)

* This square is also frequently mentioned in the Record, both as square 267 and as square S. of 267.

And it is under *deeds from Gunton*, that lot 11 in square 503, (Rec. IV, 1495,) and the lots (with a single exception,) in square 473, (Rec. IV, 1403, 1405,) represented in the present brief, are claimed.

Moreover, on March 22, 1875, scarcely more than three years before his testimony was delivered, Gunton, with others, as Trustees, under a decree for sale, had conveyed square 300, with "all the improvements, *wharves, wharfages*, rights, privileges and appurtenances thereunto belonging." (Rec. IV, 1989.)

By act Cong. March 3, 1829, was incorporated "The Washington, Alexandria and Georgetown Steam Packet Company," to continue in existence until January 1, 1849, with power "to have and hold, purchase, receive, possess, enjoy and retain lands, rents, tenements and hereditaments * * * necessary for the objects of" its "incorporation," and with power to "sell, grant, demise, alien and dispose of" any of its property so to be acquired. (6 Stat. 398.)*

Of this company, which conducted its operations from Washington,† Gunton was President, as early as 1831, (Bradley *v.* W. A. & G. S. P. Co. 9 Pet. 108, 13 *Id.* 89,) and, in 1844, (10 How. 425,) as such President, conducted those negotiations which led to twenty years of litigation, respect-

* It was long the policy of Congress, to create no corporation—not even that of the city of Washington—in this District, with a life exceeding twenty years, for which period, the charter of this company was often renewed.

Acts Cong. February 26, 1849, (9 Stat. 766;) January 15, 1870, (16 Stat. 61.)

† And, of course, from the land of Notley Young. There was no other available locality. The Eastern Branch, then rapidly filling up, was remote from habitation and without street approaches.

ing "*the Sickles' cut-off.*" (10 How. 419; 24 *Id.* 333; 5 Wall. 580.)

(*c.*) *Force.*

Force, a New Yorker, came to this city some time after the war of 1812, was here, in succession, bookseller and stationer, proprietor of a newspaper, printer, and collector and compiler of materials for a history of the United States. (4 Stat. 654; Rec. IV, 1432.)

In 1822, he became a member of the lower board of the City Councils.

On July 5, 1822, there was enacted, in effect, by those Councils, an ordinance for the appointment of a joint committee, to consist of one member from each branch of the Board, to examine a digest of the general Laws of our municipal corporation, prepared by *Samuel Burch*, which committee was empowered, in case they should be satisfied that such digest was a "faithful compilation," to adopt such measures as they might deem expedient, *for the publication* of the digest, in the interest of the city. (Burch Dig. 3.)*

Of the committee appointed under this ordinance, Mr. Force was the member from the lower board and Mr. John Law member from the Board of Aldermen.

"These gentlemen, particularly Mr. Law, gave the digest a critical examination and expressed their entire approbation of it."

They had also determined upon an order for its printing, but before such order was reduced to writing, Mr. Law had

* The pages in this volume commence to be numbered with page 6, but by counting backward from that page, the number belonging to any which precedes it, is easily determined.

expired, and in his place Mr. William A. Bradley* had been appointed member of the Committee, from the upper Board.

On February 20, 1823, Force and Bradley, each on the part of the Board he represented, request the Register of the City, to contract, in effect, on the terms best for the corporation, for printing the digest of Mr. Burch, as speedily as possible, according to the "specimen" they enclose. (Burch Dig. 3–4.)

The title page of the Digest, indicates that it was "compiled by direction of the council," printed in 1823, and embraced the laws enacted by the City, down to June 1, of that year, with an "*Appendix*" containing the acts of Cession, the laws of the United States relating to the District, the Building Regulations of the City, &c. (Burch Dig. 1.)

The Wharfing Regulations of July 20, 1795; (Rec. VI, 180–181;) the form, in general, of the conveyance in trust, executed by the original proprietors; (Rec. VI, 139;) the opinion delivered, on January 7, 1799, by Attorney General Lee to the then President Adams. (Rec. VI, 292,) and, with various other matters, the letter of September 25, 1803, from Nicholas King to President Jefferson, (Rec. VI, 297,) were all contained in the "*Appendix*" to the Digest.

(Burch Dig. 329, 330, 334, 351.)

* Of William A. Bradley, Dr. Phineas Bradley was father (Rec. IV, 1450,) and the Doctor, from Benjamin, son of the original proprietor, Notley, Young, had acquired square 356, situate on Water Street, by deed dated and recorded in the summer of 1820. (Rec. IV, 2007.)

In respect to the letter last mentioned, it is thus introduced in the "*Appendix*":—

"*The following communication, from the late Nicholas King, Esq., contains information and views of such high importance to the owners of property in this city, that it was deemed expedient to give it a place in this collection; more especially as it never heretofore found its way into print.*" Burch. Dig. 351.

Reference is made by this Court, in 109 U. S. 696–697, to the protest of Mr. *Force*, in the lower board of the City Councils, against the indefinite postponement therein, by the vote of a single member thereof, having, it was said, "a direct and personal and pecuniary interest," in the premises, of a resolution, considered on April 13, 1835, to the effect, that the City had never admitted, and, without injury to the general interests, could not admit, the existence of "water rights" of individuals, between the Long Bridge and the Eastern Branch.*

Had the assertion and imputation been well founded, there ought to have existed no difficulty in renewing the subject before the next, or some near succeeding, Council of the City, whose members might be supposed to be less subject to the influence and partiality of personal *interest*.

But they were not so revived.

And is a defeated motion, followed by *protest* from the

* Any controversy occurring on the subject, in the newspapers, in 1835, (Rec. IV, 1433, 1447, 1457–1458, VII, 2382, 2385,) between Mr. Force and "*B*," whether the latter were Joseph H. Bradley, as supposed by this Court in 109 U. S. 697, or William A. Bradley, as supposed by *Moore*, (Rec. VII, 2385,) or, as was supposed by Joseph H. Bradley, (Rec. IV, 1457, 1458, 1460,) *George Sweeney*, then a member of the board of Aldermen, is not worth considering.

vanquished, to be taken, after the lapse of more than half a century, by Judges intent upon the ascertainment of truth and bred in those principles which have been deemed most conducive to its ascertainment, as indicative of more than the delusion of expecting, that each member of society will at all times concur in the opinions of every other?

But Mr. Force* was not accurate in his assumption that the City had never admitted the existence of the "water rights" of individuals between the Long Bridge and the Eastern Branch.

Not that the City, under its charters, had regulated, in a manner the best, or even the most intelligible, the *exercise* of those rights.

The contrary, indeed, is too obvious to be denied.

But that those rights, in the abstract, long before the Resolution of Mr. *Force*, had been, by the City, taken for granted, ought not, it is believed, to be doubted.

Under the authority which had been conferred upon it, by act Cong. February 24, 1804, sec. 3, "to preserve the navigation of the Potomac," and by act Cong. May 3, 1802, sec. 7, "to pass all ordinances necessary to give effect and operation to all the powers vested in the Corporation," the City, even before its charter of 1820, had, in fact, attempted to regulate, by ordinance, the erection of private wharves.

This ordinance was approved July 29, 1819, and enacted:

* Though it does not so appear, in the present Record, Force himself, was the author of the Resolution considered on April 13, 1835. (Rec. in 109 U. S. 672, p. 481.

Sec. 1. "That the owners of *private* wharves or canals, and canal wharves, be obliged to keep them so in repair as to prevent injury to the navigation," and under pain of penalty for refusal.

By Sec. 2, "That no wharf shall hereafter be built, within this Corporation, without the plan being first submitted to the mayor, who, with a joint committee from the two boards of the City Council, shall examine the same, and if it shall appear to their satisfaction that no injury could result to the navigation, from the erection of such wharf, then, and in that case, it shall be the duty of the mayor to issue a written permission for the accomplishment of the object, which permit shall express how near such wharf shall approach the channel."

Burch Dig., 126. Rec. VII, 2315–2317.

After the passage of this enactment, came the charter of 1820, conferring upon the corporation more express powers for regulating the erection of private wharves.

And under this charter were passed further ordinances.

By act of City Councils of May 22, 1821,* sec. 1, the Mayor was authorized and requested "to appoint three intelligent and respectable citizens, *not being wharf owners*, as commissioners to examine and report to the two boards, a suitable plan to be adopted for the manner of erecting wharves upon the *shores of Anacostia and Potomac rivers*"—the Commissioners to report at the session of the

* Not furnished by the Government. (Rec. VII, 2316–2317.)

Councils to commence on the 4th Monday in June next following.

By sec. 2, the Mayor was solicited to wait upon the President, and to request his appointment of such persons as he might deem proper, to coöperate with those Commissioners.

Rothwell's Laws, D. C., 275.

By *Resolution* of the Councils, approved September 3, 1827, it was enacted "That a Committee of two members from each Board be appointed to act in conjunction with the Mayor in regulating the mode of erecting wharves," conformably to sec. 2 of the Act of Councils, approved July 29, 1819.*

By *Act of Councils*, approved January 8, 1831, it was provided:

Sec. 1. "That it shall not be lawful for any person or persons to build or erect any wharf or wharves within the limits of this Corporation, who shall not first submit the plan of such wharf or wharves to the Mayor, who, with a joint committee of the two boards of the City Council shall examine the same; and if it shall appear to their satisfaction that no injury could result to the navigation from the erection of such wharf or wharves, then, in that case, it shall be the duty of the Mayor to issue a written permission for the accomplishment of the object, which permit shall express how near such wharf or wharves shall approach the channel, *and at what angle they shall extend from the street on which they are erected.*"

By sec. 6, the Act of Councils of July 19, 1819, was repealed. (Rec. VII, 2323–2324.)

*Note, last above. (Rec. VII, 2319–2320.)

Where, then, were situate the wharves thus, though so imperfectly, sought to be regulated?

Where, then, were supposed to be those shores of the Potomac, which the municipal ordinances had in view?

Long before the date of the last of these ordinances, (an. 1831,) recorded muniments of title had dealt with many squares, on Water Street, between the Long Bridge and the Arsenal Grounds, either as having wharves already in use in connection with those squares, or as squares possessed of the riparian privilege. (*Ante*, pp. 306–315. See as to square 472, *Ante*, pp. 282–288.)

Squares such as the foregoing were all, undoubtedly, within the contemplation of the municipal enactments.

Why should it be supposed by *Force*, that enactments made by the City, were passed to regulate conditions never conceded to exist?

But, on February 20, 1823, Mr. Force was a member of the lower board of the City Councils, (Burch Dig. 4,) and, as under act Cong. May 15, 1820, sec. 6, (3 Stat. 586, Burch Dig. 18–19, Davis' Laws 344,) the members of each board were annually elected on the first Monday in June, he may be supposed to have been a member of the lower board when, on March 19, 1823, there were established, by act of the City Councils, "*as Fish docks*," amongst other "sites,"—

"The Steam-boat wharf* on the Potomac, near the bridge

* Probably, the Lenox wharf, opposite square 270. (Rec. IV, 1978, 1426, 1449, 1455, 1481, 1761.) Square 356 had been acquired by Dr. Phineas Bradley, in 1820, (Rec. IV, 2007,) but the wharf opposite that square, was not built, by his son, (Rec. IV, 1450,) William A. Bradley, until 1825, (Id. 1433, 1455,) though the latter, previous to that year, had been a member and the factor of a certain Steamboat Company engaged in carrying the public mail. (Rec. IV, 1455.)

over the Potomac; and at Cana's wharf,"* (Burch Dig. 90,) an act plainly recognizing, *in two localities*, the "water rights" of individuals, between the Long Bridge and the Eastern Branch.

The Plan of William Elliott, opposed by Mr. Force, in 1835, under the administration of William A. Bradley, was, as we have seen, approved, by Mr. Force, during his own administration, in 1839. (*Ante*, p. 267.)

The professed object of the plan was that of "*securing*" the water privileges of individuals and of the public.

It assigned to each private possession on Water Street, between the Long Bridge and the Arsenal Grounds, before their enlargement, a fixed and permanent wharfing front on the Potomac. It reserved to the public, the right of wharfing only in front of what were considered Reservations, and opposite the ends of the streets terminating towards the river, in Water Street.

And the plan could be adopted, through municipal ordinance, without the coöperation of the Mayor, only by the votes of two-thirds of each branch of the Councils. (*Ante*, p. 269.)

It is difficult, after the lapse of so great a period, to explain with certainty the considerations by which Mr. *Force* was induced, in 1839, to relinquish his opposition to the *Elliott Plan*.

* Opposite part of square 472. (*Ante*, pp. 283–284.)

An adequate reason may, however, be suggested.

The opinion in *Van Ness* vs. *The City*, 4 *Pet.* 222, had been announced at *Jan T.* 1830.

And Mr. Justice *Story* in there observing that the United States held "an UNQUALIFIED *fee* in the Streets" of the City, employed, no doubt, language broader than was requisite for a decision of the question before him, and less exact than that afterwards adopted by Mr. Justice *Grier* when, in referring to the same subject, he held, at *Dec. T.* 1857, that *at Washington*, "as in all other cities and towns, the legal title to the public streets, is vested in the sovereign, *as trustee* for the public."

Smith vs. *Corporation of Washington*, 20 *How.* 147.

See also *Railroad Company* vs. *Schurmeir*, 7 *Wall.* 289, 290.

And Mr. Justice *Harlan*, in *B. & P. R.R. Co.* v. *Fifth Bap. Church*, 108 U. S. 331–332.

Nevertheless, eight years after the decision pronounced by Mr. Justice *Story*, and at *Dec. T.* 1838, there had arisen before the Circuit Court of the District of Columbia, the question involved in the case of the *Chesapeake & Ohio Canal Company* vs. *The Union Bank of Georgetown.*

In this case, as we have already seen, the annexation of the riparian privilege to the opposite private property, notwithstanding the intervention of a public street, had been judicially established, as part of the local law.

(*Ante*, pp. 331–332.)

It was less than four months after this decision, that *Force*, as Mayor, approved the plan which four years before he had actively opposed.

And *this*, notwithstanding the intimation, erroneous, indeed, (Rec. IV, 1448–1449,) of Mr. *Moore*, whose *ex parte* deposition in the cases reported in 109 U. S. 672, was introduced by the Government, in the present controversy, that Mr. Force, in 1836, *as the representative of anti-riparian sentiment*, was elected Mayor of the City, over a competitor named in the place of *William A. Bradley*, upon the retirement of this last from the canvass, on the eve of the election. (Rec. VII, 2385.)

On May 26, 1840, Force, as Mayor, grants unto *William Easby*, permission "to *erect* a solid wharf the whole extent of square No. 12, in front thereof, and to *extend* a wharf in front of square south of No. 12, thirty feet, fifteen of which to be solid," (Rec. III, 773–774,) Easby having, about 1831, constructed a ship-yard opposite part of the latter square, (Rec. II, 231,) and, no doubt, at the time of the license granted him by *Force*, owning, or claiming, or representing those owning or claiming, the squares opposite which the license was to operate.

The situations of the squares are shown Rec. V, plats second, fourth and fifth from p. 118. See Rec. III, 821–822.

It was asserted in 1871, in the Report of a Committee of the House of Delegates of the Legislative Assembly of the District of Columbia (Rec. VII, 2290,) that in 1846, *Force*, in part prepared the "*Halliday Report*."

This assertion is otherwise sustained in the evidence. (Rec. IV, 1449.)

Its confirmation, however, only exhibits a further fluctuation of opinion on the part of Mr. *Force*—a fluctuation rendered more remarkable, from the circumstance, that, whereas, there was abundant justification, upon express legal decision, for the claim of wharfage privileges appurtenant to private property, when the plan of *Elliott* was adopted in 1839, there was no warrant whatever for its denial thereafter, in the lifetime of Mr. Force, if, as is supposed, he died in 1869 or 1870. (Rec. IV, 1422, 1434.)

(d) *Halliday Report.*

On May 25, 1846, *James F. Halliday*,* from the Committee of *Police* of the lower board of the City Councils, presented to that board a *Report* (Rec. VII, 2290,) asserting the right of municipal control over the riparian privileges on Water Street and, in effect, denying the existence of any private title to those privileges. (109 U. S. 692.)

Yet this Report, though "ordered to be printed and to accompany the laws," was, nevertheless, "laid on the table," and never ripened into legislation.

It does not appear to have been even considered, by the *Board of Aldermen.*

Its value must depend entirely upon the soundness of its conclusions when measured by a judicial standard.

*He had been foreman in the printing office of *Force*, (Rec. IV, 1460-1461,) as, according to the City Directory of 1864, *Moore* had been foreman to the *National Intelligencer.*

With the general conclusion contained in Mr. *Halliday's Report*, the appellants specially represented in the present brief, ought not justly to be viewed as interested or concerned.

Under the contract of sale made with *Morris* and *Greenleaf* in 1793, that portion of *Notley Young's land* which fell, on division, to the public, occupies a position of its own. And its distinctive situation cannot be affected by comparisons drawn from the predicament of other property *in dissimili casu.*

But that report, in reference to the public portion of *Notley Young's* land, contains the following concession: "Morris and Greenleaf were, by their contract, excluded from all the water lots. They were not permitted to select one on Rock Creek, the Potomac or the Eastern Branch, *but as they were entitled to the lots in Notley Young's land*, THEY HAD THE PRIVILEGE OF WHARFING ANNEXED THERETO." (Rec. VII, 2229.)

Upon this admission, it is not easy to understand why, under appropriate terms of conveyance, the like privilege should be incapable of transfer, in connection with any subsequent sale of the lots by the first purchasers, or their assigns.

To *Mr. Force* we are indebted, however, for the following explanation:

"The wharfing privilege referred to in the contract, was a mere privilege. It was not a right to wharf out into the channel, nor was it property to be sold and transferred. It was a permission granted in the first place, to Notley

Young, and by this agreement extended to Robert Morris and James Greenleaf, but to no other person, to erect a wharf for their own special uses as landing places for building materials, or whatever else they might require. The wharfing privilege extended no further." (Id. Ib.)

Several reflections arise upon this explanation.

1. It is difficult to discover what is here intended by "*a mere privilege*," unless in connection with the further assumption that "it was a permission granted in the first place to Notley Young," and through the contract of December 24, 1793, "extended to Morris and Greenleaf but to no other persons," from which it must be inferred that it was regarded by the Committee as *a privilege in gross*, since they deny, also, that it was "property to be sold and transferred."

Now a mere license, or privilege, in gross, is founded in personal confidence.

3 *Kent's Com.*, 452.

"It conveys no estate or interest, and is revocable at the pleasure of the party making it." "It ceases with the death of either party, and cannot be transferred or alienated by the licensee, because it is a personal matter, and is limited to the original parties to it. A sale of the lands by the owner instantly works it revocation, and in no sense is it property descendible to heirs."

De Haro vs. *U. S.*, 5 *Wall.*, 627;

Wasb. on Easements, 5–6, (3d *edit.*)

The notion of a merely personal license, as thus explained, is quite epugnant to the concession already quoted from the Rep ; a concession, indeed, which merely repeats the languag of the contract conveying the *land* and "the privileges of wharfing ANNEXED THERETO."

The privilege, being conveyed as *annexed to the land*, can in no sense be regarded as an incident or license *personal to the grantees.*

"The riparian right," it was observed in *Yates* vs. *Mitchell*, "*is* property and is valuable."

10 *Wall.*, 504.

The alienation of the land with which such right is connected, operates no revocation of the right itself. Like every other description of property, it is susceptible of valid and successive transfer.

Nothing can be more certain, both upon principle and authority, than that whenever an easement or other incorporeal hereditament is annexed to an estate and conveyed therewith by grant, the easement or other hereditament, until severed from the estate, *may* pass by assignment of the principal thing, and *will* so pass in the absence of all evidence of a contrary intention.

When "one grants or reserves a right of easement over one parcel of land in favor of another, such easement, by such act of creation, or annexation, would become incident or appurtenant to such estates, respectively, and pass as appurtenant in after conveyances, by, or even without, the word *appurtenances*, so long as the estates should subsist as distinct estates in different proprietors."

Wasb. on Easement, 35, (3d *edit.*)

2. The theory that the wharfing privilege "was a *per-*

mission granted, in the first place, to Notley Young," is founded in a conception of the subject, as original as erroneous.

"*A permission*," it may be asked, of what character? "*Granted*"—by whom? And "*in the first place*"—when?

It has already been fully established that, as original proprietor of *Duddington Pastures*, Notley Young was vested with "*full property* in the shores," and with "the privilege of making and carrying out wharves and other improvements" adjoining his land, and that through such the title of Notley Young alone, could the claim of the public as riparian proprietor over any portion of that land, be successfully adduced.

3. To the assertion that the privilege acquired by Morris and Greenleaf under their contract, "*was not a right to wharf out into the channel*," it may be replied it is the *existence* and not the *extent* of the privilege, that, at the present moment, is involved in discussion.

But, if this privilege conferred no right of wharfing *to the channel*, it must yet have involved the construction of improvements *somewhere in the water*, since it could not be exercised wholly upon the bank of the stream.

This is conceded by the Report when it describes, (however unreasonably,) the purpose for which the privilege was granted to the purchasers, as that of erecting wharves for "*landing places for building materials, or whatever else they might require.*"

"Landing places for building materials" necessarily import the appropriation of some portion of the shore below high-water mark, on rivers like the Potomac.

It is true that this privilege, in the opinion of the Committee, was conferred upon the purchasers only "*for their own special uses.*" But no such restriction can be intended

from the Contract. Its language is broad and general. And it transfers the appurtenances to the grantees, not as a special or personal concession, but as a matter "*of course*," with the land to which, by the very terms of the transfer, the appurtenance is represented as "*annexed*."

As the denial of the riparian privilege to that portion of the land of *Notley Young*, which fell, on division, to the Government, is thus rested upon the theory that that privilege *was personal to Morris* and *Greenleaf*, under their contract with the Commissioners, it must have followed, in the view of the committee, that the reverse of that theory would have established the annexation of the privilege *to the land itself*.

It is useless to examine the report further. It contains nothing of moment which has not, in some connection, been already noticed by the brief.

In 1870 Lord *Romilly* said: "I hope, that, by means of improvement the law will ultimately be reduced into a state, that a man of ability who has devoted his whole life to the subject, may be able to tell a person what the law really is on any one point. That state of things, I hope, may be arrived at; but it is not so now, and will not be so in my time."

Mullings vs. *Trinder*, *L. R.*, 10 *Eq.*, 455.

That exemption from a disability thus felt and admitted by the judicial mind, should be found among men wholly inexperienced in the science of law, is not to be expected. And it is no imputation upon the eminently useful and

respectable calling of Mr. *Force*, to say, that it does not always produce philosophers, and that it failed to prevent him from falling into grave and obvious error, respecting the legal interpretation of the contract made by the Commissioners with *Morris* and *Greenleaf*, on the 24th December, 1793.

The privilege of wharfing mentioned in that contract, was not a *permission* granted, in the first instance, to *Notley Young*, and by agreement *extended* to *Morris* and *Greenleaf*, as a mere personal license.

It was an absolute right, vested by legislative grant, in Mr. *Young*, (prior to the cession from Maryland,) as proprietor of the adjoining land, and through and under his title and conveyance, transferred by the Commissioners to *Morris* and *Greenleaf*, as an incident *annexed*, in terms, to the land of which, under the contract, they became the purchasers.

(e.) *Van Riswick.*

On March 28, 1839, *Bartle*, had conveyed to *McLean*, lots 14, 15, 22, 23 and 25 in Square 503,* together with all the *wharfing and water-privileges from the west side of Sixth Street* thereunto belonging, and all the wharfing and water-privileges belonging and appertaining to lot number sixteen," in that square, "making together one hundred and forty-four (144) feet in breadth of wharfing privileges." (*Ante*, p. 313.)

On March 8, 1841, and over the veto of Mayor *Seaton*,

* See the Plat of this Square. (Rec. VI, 260, VII, 2149.)

the City Councils had granted to McLean "the exclusive privilege" within the limits of the corporation, "of using his wharf,* at the lower end of Sixth street, on the River Potomac, as a fish dock, until the 1st of July, 1844," "reserving," to the City, however, the privilege of establishing one fish dock on the Eastern Branch, at or east of South Capitol Street, McLean to furnish suitable Bond, that he would at the expiration of the date last mentioned, "give to the Mayor *good and sufficient* and *clear* right and title to and possession of his said *wharf*" and the said lots, the Mayor being authorized, upon such conveyance and surrender, to allow McLean, his heirs, or assigns, a fair valuation, to be ascertained by appraisers, who, in the event of disagreement, might appoint an umpire, "for the *sheds, vats* and *fixtures* thereon, pertaining to the said fish dock."

The property conveyed, on March 28, 1839, by Bartle to McLean, had, in the terms of that conveyance, been transferred, on August 19, 1842, by McLean to Gunnell. (*Ante*, p. 318.)

Differences between McLean, or his grantee, and the City, arose to retard the conveyance and the valuation contemplated in the ordinance of 1841.

By act of the City Councils of January 22, 1846,—not furnished by the Government—some new and particular provisions were declared for the arbitration of the claim of

* The act—not furnished by the Government—is badly phrased. What is meant is, not that McLean shall have the exclusive use of his *own*, but that his wharf shall be the exclusive place for landing or docking fish, during a given period, under the reservations and conditions expressed in the ordinance.

McLean, or his assigns, arising under the ordinance of March 8, 1841, and to secure a speedy adjustment "of all unsettled questions connected with the said fish wharf and appurtenances," it was enacted, that the arbitration was not to proceed, unless, within ten days after January 22, 1846, McLean, or his assigns, should execute to the City and deliver to the Mayor, "a good and valid deed of conveyance," for the lots mentioned in the ordinance of 1841, "with all the *improvements and fixtures thereunto* belonging or in anywise appertaining." (43 Council Laws.)

We have seen, in another connection, that, on January 29, 1846, Gunnell conveyed to the City the property mentioned in the deed to McLean and with the extent and description of "*wharfing privileges*" mentioned in that deed. (*Ante*, p. 318.)

Amongst the six signatures to the *Halliday Report* appears the signature of *Mr. John Van Riswick*, (Rec. VII, 2314,) a carpenter, engaged in the saw-mill business. (Rec. IV, 2068–2069.)

Under sec. 6 of the act Cong. of May 15, 1820, (4 Stat. 586,) Mr. Van Riswick, as well as every other signer of the Report, must, if not elected to fill a vacancy, have been in the lower board since June, 1845, and, hence, on January 22, 1846.

And, as matter of fact, *Van Riswick* as well as *Dr. William Gunton* were members of the 38th Council of the City, (Senate Doc. No. 238, 2d sess. 55th Cong., p. 25,) at which was enacted, over the veto of the Mayor, the ordinance of March 8, 1841.

A legislator for the City, possessing the opinions expressed in the Halliday Report, might be expected, in the abstract, to have felt it necessary to oppose both of these enactments.

There is reason to believe that the voice of Mr. Van Riswick was not heard against either.

To lot 15, in square 503, he had bought in a tax-title, as early as August 1, 1830, though the deed which he received was not recorded until September 19, 1851. (Rec. IV, 2054.)

We have seen, in another connection, that, by acts of the City Councils of May 22, 1852, and of August 5, 1852, the Mayor was empowered to make sale of the wharf acquired by the City from Gunnell, that such sale (which included the lots conveyed to the Corporation by Gunnell,) having been made, Van Riswick was purchaser thereat, (*Ante*, p. 318,) and that, by act of the City Councils of September 17, 1852, the sale is ratified and confirmed. and the Mayor is empowered to convey to such purchaser, "all the right, title, and interest of this corporation in and to the said lots and wharf, as the same were conveyed to this corporation by William H. Gunnell, by deed bearing date the 29th day of January, 1846." (*Ante*, p. 319.)

And, on March 30, 1853, the Mayor conveyed accordingly. (*Ante*, p. 319.)

This conveyance appears at large (Rec. I, 206–207,) and was executed by Mr. *John W. Maury* * (then Mayor,) who had acquired part of square 329, in 1836, (Rec. IV, 1998,) and had bought or sold, parts of that square with "*water-privileges*," in 1839, in 1846 and in 1852. (*Id.* 1998–2000.)

* Father to a gentleman of the bar well and favorably known to this Court.

Of the property of which he thus received a conveyance from Mayor *Maury*, Van Riswick, on April 10, 1856, conveyed to *Coyle*, under whom, through mesne conveyances, claim certain of the appellants specially represented in the present brief, lots 15, 22 and 23, in square 503, "with all and singular the rights, *water-privileges* and appurtenances belonging * * to the north half of the lot numbered fifteen (15,) and the privilege of wharfing and water-privileges belonging * * to lot numbered sixteen (16,) in said square." (Rec. IV, 1406.)

For lots 11 and 12, amongst others, in square 503, Van Riswick, on February 24, 1852, obtained a conveyance from *William Gunton et als.*, Trustee, (Rec. IV, 2053, 1405,) and, on May 19, 1856, conveyed lot 11 to the *Potomac Steamboat Company*, (Rec. IV, 1406,) under which that lot is claimed by certain of the appellants specially represented in the present brief.

In connection with property still owned in square 503, by Mr. Van Riswick, after his alienations therein, in 1856, his heirs and children are claimants in the present controversy as riparian proprietors. (Rec. I, 196 *et seq.*)

As to the Sea Wall on Water Street.

It is contended, however, that the riparian privileges annexed to the squares in controversy, were appropriated to

the public, through *the erection of a sea wall along the path of Water Street.*

There are acts of the City Councils, March 8, 1850, appropriating $500, for the repair of the sea wall, on the Potomac, between 10th and 13th streets, west, (Rec. VII, 2337,) of September 13, 1860, appropriating $100, for the repair of the sea wall on that River, between 12th and 13½th streets, (Rec. VII, 2342,) persons who may wharf thereon, to pay "such rates of toll, as wharfage, as are usual charged *by the owners of the adjacent wharf property*," (*Id., Ib.,*) and of May 3, 1866, (*Id.* 2347,) appropriating $2,000, to continue the construction of the sea wall, on that River, from 7th Street west to 9th Street, west.

None of these appropriations, it is evident, deal with the three squares specially represented in the present brief.

In the neighborhood of square S. E. 267, in the earliest recollection of *Given*, there was no sea wall, but one was begun by the City, in the early *Forties*, as he thinks. (Rec. IV, 1781.)

Harvey, however, owner of square S. E. 267, at the time of the institution of the suit below, (Rec. IV, 1966,) and who had been connected with that square, since 1836, (*Id.* 1936,) deposes that the sea wall in front thereof, had been built by the owners, or lessees, of the square, and not, he was quite sure, by the City. (*Id.* 1948.)

Lambell, owned in square 329, (Rec. 1762, 1994–1995,) and it may be inferred, that he owned, also, in square 391, since his devisees, in 1838, received a conveyance for lot 2, in that square, (Rec. IV, 2027,) and he, in his lifetime, had built a shipyard for small vessels, opposite part of the latter

square, (Rec. IV, 1451,) and, for the protection of such yard, had erected a *sea wall*. (Rec. IV, 1461.)

William A. Bradley, in 1830, had acquired one undivided moiety of square 356, with "the water rights and privileges." (Rec. IV, 1376, 2008.)

He erected opposite part of that square, a building, formerly known as "*Jones' Tavern*," and also a *sea wall* in front of the building. (Rec. IV, 1450–1451.)

Rapley, since 1863, appears not only to have constructed a *sea wall*, but to have graded Water Street, in front of square W. 471. (Rec. IV, 1115.)

Forsyth, the District, and, formerly, the City, Surveyor, in 1876, (Rec. IV, 1338,) could not say that the *sea wall* at *Page's* wharf, (opposite square 472,) had been built by the public, and he thought the *wall* opposite the property of the *Ferry Company*, (square 473,) had been constructed by that Company, though "the balance," from 9th Street down to 6th Street, and in front of square 504, had been filled in by the City, or by the District.

(Rec. IV, 1347–1348.)

This statement, if correct, would show, that, opposite *three* of the lots specially represented by the present brief, to wit, original lots 1 and 2, in square 473, and lot 11, in square 503, (Rec. I, third plat after p. 324,) the sea wall had been constructed by public authority.

The recollection of this witness could scarcely be accurate, in respect to all of lot 1, in square 473.

The lot had been conveyed, on July 17, 1856, by *William Gunton et al.*, to the *Potomac Steamboat Company*, (Rec. IV, 1403,) of which Mattingly was General Superintendent. (Rec. IV, 1646.)

There can be no doubt, that a wharf had previously existed opposite this lot, but had either fallen into dilapidation, or become otherwise unsuitable for business purposes.

On August 7, 1856, Mattingly, having obtained an official survey of the square, had located opposite part of lot 11 therein, the site of a "*new wharf*" and had delineated on that survey, a plan of such wharf, the plan being at once approved by Mr. Magruder, the Mayor of the City. (Rec. IV, 1838–1841; Rec. VI, Diagram immediately after p. 366.)

By reference to the Diagram, thus approved, it will be seen, that it indicates an existing "cut" of more than 4 feet, on the N Street approach to the wharf, and that it provides for raising the sea wall more than 3 feet "higher." (Rec. VI, immediately after p. 366.)

Nor is it at all probable, that the memory of Forsyth was more correct, in respect to lot 11, in square 503, conveyed by *William Gunton et. al.* to *John Van Riswick*, on February 24, 1852, and by the latter, on May 29, 1856, to the Potomac Steamboat Company, (Rec. IV, 1405–1406,) since, as we have seen, a wharf, in use by steamers connecting, through short over-land transfer, with the Richmond, Fredericksburg and Potomac Railroad Company, had existed opposite part, at least, of that lot, as early, certainly, as 1836, (*Ante*, pp. 5–6,) and the structure now occupying the site of that wharf, is designated upon the plat (Rec. I, third plat from p. 324,) furnished by Surveyor Forsyth himself,

under his official hand, for use in the present controversy, as "*Old R., F. & P. wharf.*"

It was the belief of Mr. *Joseph H. Bradley* that Water Street, in front of square 472, "was not made until after the breaking out of the late war," "but I know," he added, "as matter of fact, that a sea wall, stone wall, was built near the channel, in the line or direction with the channel, and the earth filled in, where Water Street is now defined, by Mr. George Page, long before the breaking out of the war, he being owner of part of square 472, and claiming the right to erect that wharf, as appurtenant to his lots in square 472." (Rec. IV, 1428.)

Again: "Q. Do you know who first built the sea wall in front of square 472?

"A. As regards the wharves which were made before my recollection, they were each of them supported by a stone wall for a certain distance. The first sea wall, the erection of which I have any memory, was built by Mr. George Page, opposite square 472. It is impossible for me to say when—about 20 or 25 years ago." (*Id.* 1462.)

But it was certainly never claimed until very recent times, that the wharfing privileges of individuals had been affected or impaired by the construction of a sea-wall on Water Street.

Under the ordinance passed by the City Councils, on February 22, 1839, and adopting the plan of William Elliot, it was plainly intended that no such consequence should follow. For by that ordinance it was expressly enacted that the wharves thereafter "to be constructed" should "be erected on piers or piles *from a wall running the whole distance on the water line of Water Street.*" (*Ante*, pp. 266–267.)

And when on the 23d of January, 1851, the City, through Mr. *J. M. Carlisle*,* her counsel, filed a bill to enjoin *George Page* from erecting a wharf opposite square 472, *in a manner contrary to the Elliot Plan*, it was expressly averred in that bill, as one of the grounds of complaint and reasons for injunction, that "*Page* has not erected and evidently does not mean to erect *any wall on the water line of Water Street*." † (Rec. IV, 1388.)

It is not pretended, that the City, or the District of Columbia, ever entered upon any existing wharf, for the purpose of erecting a *sea wall* adjacent thereto.

Where Water Street might, be made, opposite lots before

* This learned, gifted and attractive gentleman was admitted to this bar at January Term, 1837, (11 Pet. V.) and, for nearly forty years, there appeared in a greater variety of causes than were represented, perhaps, by any other counsel bred in the District.

† By Joint Resolution of the City Councils of February 22, 1851, Page is permitted "to proceed to fill up his *new* wharf," "as far as he has *now laid his outer wall next to the channel*," but not to intrude *upon the private rights of any person*," and, "after his filling up to said outer wall," to fill therefrom in conformity with the acts of the City Councils of January 8, 1831, (See Rec. VII, 2323-2324,) and February 22, 1839, (*Ante*, pp. 266-267,) the Mayor, upon assurance from Page, of his willingness to comply with the Joint Resolution, and his payment of the costs of the injunction, being instructed to withdraw the same, provided the approval of the President of the United States be obtained to such Resolution. (Rec. VII, 2338.)

This last proviso, though, in consideration of the plan of Water Street and the mode of wharfing approved by President Van Buren, in 1839, and the obligation imposed upon Page, by the Joint Resolution, to respect that plan, by observing the local ordinance of 1839, is illustrative of what has been already remarked with reference to such ordinance. (*Ante*, pp. 268-270.)

which no wharves had been erected, it would be convenient, if not necessary, to secure the street from the action of the tides and elements, by sea walls, or other abutments, whether the street were made by the public or by individuals.

If the fee in Water Street belonged to the public, but the lot owner, on the north side of Water Street, was still lawfully entitled to the privilege of wharfing on the south side of that street, whether it might be the duty, or not, of the public, to protect and preserve the street, in the interest of general health, comfort and convenience, it could never be tolerated, that through any such exercise of the police power, by the City, the right of the wharf-owner should become extinguished.

There were expedients enough, by which, consistently *with due process of law*, the wharf-owner might be required to respond to any improvements, made at public expense, which contributed specially and directly to his benefit.

As long as resort were had to none of these, no greater anomaly would be found in his exercise of the riparian privilege from a sea wall erected by the public, on the south side of Water Street, than in his exercise of the like privilege from the south side of Water Street itself, when belonging to the public.

The licenses granted by the Chief Engineer of the Army were null and void.

These licenses are ten in number, the earliest being that granted to *Pettibone*, on January 18, 1868, (Rec. I, 160;

IV, 1384,) and the latest, that granted to Creveling, on July 25, 1884. (Rec. IV, 1420.)

They are mentioned to show the expedients to which recourse has been had for the invasion of the rights of the riparian proprietor.

In 1884, after a careful analysis of certain legislation of Congress, respecting this District, Mr. Justice Cox, speaking for the Supreme Court thereof, said :

"Therefore, in our judgment, the engineer of the army never had the slightest power in the world to license the erection of wharves on the Potomac and Eastern Branch."

The District *v.* Johnson, 3 Mack., 131.*
(See, also, Rec. VII, 2245.)

The Washington Steamboat Company, Limited, occupies an exceptional position in the present controversy.

From the analysis already made of the act Cong. August 5, 1886, and of the bill filed thereunder, (*Ante*, pp. 1–4,) the object of both appears to be that of quieting the title

* In the case from 3 Mackey, the Johnsons, when sued by the City for rent, accruing under statutory leases from her councils, (*Id.* 121–123,) set up the license granted by the Chief of Engineers to *Pettibone*, and by the latter assigned to the Johnsons.

For such leases by her Councils, the late Dr. Thomas Miller, then owner of square 300, (Rec. IV, 1387,) opposite which the leases were to operate, brought *case* against the City, in 1870. (Rec. IV, 1382.)

On the trial of that action, (though the present record does not so disclose,) there was verdict for the defendant, which, however, on motion, was set aside, but the intervention of the litigation culminating in 109 U. S., 672, rendered a further trial undesirable, before, and useless after, the end of such litigation.

of the government, to the "land and water affected by the improvements of the Potomac river, or its flats, in charge of the Secretary of War."

The government could not well be expected to know every claim that might exist in respect to all portions of the *locus in quo*, and claims there might be, antagonistic to each other, as well to the title of the United States.

U. S. *v.* Morris, 6 Mackey, 90; S. C. 18, D. C., (7 Mackey,) 8; Rec. VII, 2473–2474.

Hence, the direction for *publication*, and for process, citing all parties in interest, to appear and answer the bill and "*to set forth and maintain*" any their rights in the premises; and, hence, also, the bill, as to the wharf owner, was, in effect, *a bill for discovery and relief.*

But the act of August 5, 1886, provides, in effect, that, if, in the course of the proceedings which it directs, there shall be found to exist, in favor of a defendant, "any right, title or interest adverse to the *complete* and *paramount* right of the United States," the value of such right, title or interest shall be ascertained, in a summary way, exclusive of betterments made by the Government, and report shall be made to Congress.

The language of this provision is peculiar.

It is not such as would commonly occur in legislation directing litigation for the recovery by the government of what was conceived to be *its own.*

And it is not such as is usual in enactments for the acquisition of property, for public objects, under proceedings in condemnation.

What then, in a suit brought by the Government, in a court of equity, may be regarded as *a right, a title or an*

interest, "adverse to the *complete* and paramount right of the United States"?

It is not claimed for any of the appellants represented by the present brief, that the Government, in such a suit, becomes subject to every equitable estoppel that might arise against a private person.

For, not to extend illustrations, the unauthorized acts of the officers of the Government, have never been admitted to involve the United States in those consequences which the like acts, if committed by the agents of an individual, would often be held to involve their principal.

But where, for a long series of years, the action of the legislative, executive and judicial departments of the United States—of Congress alone—has been consciously and consistently of a character to encourage and induce the citizen to acquire particular property, and otherwise to change his condition, upon the faith of such action, unless it be true, that, in any suit in equity brought by the Government against the citizen for the recovery, or acquisition, of that property, the Government be concluded by the acquiescence, invitation and consent of the departments which compose it, then is there, except in name, no equitable jurisdiction, in such a suit.

But the Constitution of the United States extends the judicial power to "cases in law and *equity*."

2 Story Const. § 1645.

Cates *v.* Allen, 149 U. S. 456–457.

And the equitable remedies in the Federal tribunals have been left to be determined, for the most part, according to the principles of equity "as distinguished and defined in the country from which we derive our knowledge of those principles." (3 Wheat. 223.)

And this, without express relation to the character of the parties to the record.

Reference has already been made to act Cong. July 1, 1864, creating the Potomac *Ferry* Company, (*Ante*, pp. 9–10, 327–329,) and to the purchase (on June 1, 1881,) of the property acquired, and improvements conducted, by that Company, under such enactment, by the *Washington Steamboat* Company, Limited, one of the appellants specially represented by the present brief.

To Congress has been committed, by the Constitution, an unlimited power of disposition over the territory and other property of the United States.*

U. S. *v.* Gratiot, 14 Pet., 537.

Gibson *v.* Chouteau, 13 Wall., 92, 99.

If the act Cong. July 1, 1864, creating the Potomac *Ferry* Company, cannot be regarded as operative, *by way of power* to that Company, on the theory that there existed, in law, no *private* real estate, adapted, in point of situation, to the franchises and obligations of that Company, but that all real estate, so adapted, was the property of the United States, then ought the act of July 1, 1864, to be construed *as a release of the title of the government* to the imperfect right to such land as that Company, for the purposes of its creation, might acquire from individuals.

The situation, else, is too discreditable to be attributed to organized government.

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* To the extent, of course, of title.

As between individuals, the predicament, might be thus stated :

A, secretly claiming the whole of a given square, induces *B* to purchase certain lots therein, from *C*, in possession, and believing himself owner, thereof.

B, having purchased and paid for the lots, and constructed expensive improvements thereon, is subsequently sued therefor, in a court of conscience, by *A*, asserting title to the whole of the square, from a period *anterior to his acquaintance with B.*

It is not agreeable to linger upon this predicament.

The appellants represented on the present brief, concluding a long and laborious investigation, constantly attended with the recognition of that duty, which far superior to any temporary interests of their own, they must owe to the Supreme tribunal of their country, may say, to each of its members,

Si tibi Vera videtur,
Dede manus ; aut si Falsa est, accingere contra.

JOHN SELDEN,

Counsel for the Heirs of Moncure Robinson, Deceased, and Others, and for the Washington Steamboat Company, Limited, Appellants.